

# State Office of Administrative Hearings



Cathleen Parsley  
Chief Administrative Law Judge

December 17, 2013

Anne Idsal, General Counsel  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin Texas 78711-3087

**Re: SOAH Docket No. 582-13-3040; TCEQ Docket No. 2013-0174-WR;  
Petition for the Appointment of a Watermaster in the Brazos River  
Basin Filed by the Brazos River Coalition**

Dear Ms. Idsal:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than January 6, 2014. Any replies to exceptions or briefs must be filed in the same manner no later than January 16, 2014.

This matter has been designated **TCEQ Docket No. 2013-0174-WR; SOAH Docket No. 582-13-3040**. All documents to be filed must clearly reference these assigned docket numbers. All exceptions, briefs and replies along with certification of service to the above parties shall be filed with the Chief Clerk of the TCEQ electronically at

<http://www10.tceq.state.tx.us/epic/efilings/> or by filing an original and seven copies with the Chief Clerk of the TCEQ. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,



William G. Newchurch  
Administrative Law Judge



Hunter Bunkhalter  
Administrative Law Judge

HB/WGN/mle/l  
Enclosures  
cc: Mailing List

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**AGENCY:** Environmental Quality, Texas Commission on (TCEQ)  
**STYLE/CASE:** PETITION FOR BRAZOS RIVER WATERMASTER  
**SOAH DOCKET NUMBER:** 582-13-3040  
**REFERRING AGENCY CASE:** 2013-0174-WR

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SOAH DOCKET NO. 582-13-3040  
TCEQ DOCKET NO. 2013-0174-WR

PETITION FOR THE APPOINTMENT OF A WATERMASTER IN THE BRAZOS RIVER BASIN FILED BY THE BRAZOS RIVER COALITION	§ § § § §	BEFORE THE STATE OFFICE  OF  ADMINISTRATIVE HEARINGS
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**SOAH DOCKET NO. 582-13-3040**  
**TCEQ DOCKET NO. 2013-0174-WR**

<b>PETITION FOR THE APPOINTMENT</b>	<b>§</b>	<b>BEFORE THE STATE OFFICE</b>
<b>OF A WATERMASTER IN THE</b>	<b>§</b>	
<b>BRAZOS RIVER BASIN FILED BY</b>	<b>§</b>	<b>OF</b>
<b>THE BRAZOS RIVER COALITION</b>	<b>§</b>	
	<b>§</b>	<b>ADMINISTRATIVE HEARINGS</b>

**PROPOSAL FOR DECISION**

**I. INTRODUCTION**

A number of holders of water rights in the Brazos River Basin (Basin) of Texas (Petitioners) have filed a petition (Petition) asking the Texas Commission on Environmental Quality (TCEQ or Commission) to authorize its Executive Director (ED) to appoint a watermaster to monitor, regulate, and control water withdrawals from the Basin.<sup>1</sup> In the Petition, they claim that a watermaster is needed because senior water rights in the Basin are threatened.

After the Petition was filed, several Petitioners withdrew their requests for a watermaster. Among the Petitioners who have not withdrawn are the Aligned Parties: Gulf Coast Water Authority (GCWA), the Dow Chemical Co. (Dow), NRG Texas Power LLC (NRG), and R.E. Janes Gravel Co. (Janes Gravel). The Aligned Parties continue to seek the appointment of a watermaster with jurisdiction over the entire Basin.

Several water right holders who are not petitioners have intervened in this case, and some of them (Protestants) oppose the Petition. They contend that the Commission has no jurisdiction to grant the Petition because less than 25 Petitioners presently seek the appointment of a watermaster. Even assuming the Commission has jurisdiction, the Protestants contend that the remaining Petitioners have failed to show that senior water rights in the Basin are threatened and a watermaster is needed. Some Protestants argue that a watermaster is not needed for all parts of the Basin even if one is needed for some portions of it.

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<sup>1</sup> ED Ex. A at 20-39.

The ED recommends appointment of a watermaster for Lake Possum Kingdom and the portions of the Basin below that lake. The Brazos River Authority (BRA) neither supports nor opposes appointment of a watermaster, but contends that the watermaster should have jurisdiction over the entire Basin if appointed.

The Administrative Law Judges (ALJs) conclude that the Commission has jurisdiction, senior water rights in the Basin are threatened, and a watermaster with jurisdiction over the entire Basin is needed. They recommend that the Commission grant the Petition and direct the ED to appoint a watermaster with jurisdiction over the entire Basin.

## II. APPLICABLE LAW

On the Commission's own motion or after receiving a petition, the Commission may authorize the ED to appoint a watermaster. Texas Water Code § 11.451 provides:

On petition of 25 or more holders of water rights in a river basin or segment of a river basin or on its own motion the commission may authorize the executive director to appoint a watermaster for a river basin or segment of a river basin if the commission finds that the rights of senior water rights holders in the basin or segment of the basin are threatened.

Texas Water Code § 11.452 sets out the procedure for determining whether a watermaster should be appointed:

- (a) On receiving a petition for appointment of a watermaster or on its own motion, the commission shall call and hold a hearing to determine if a need exists for appointment of a watermaster for the river basin or segment of the river basin.
- (b) At the hearing persons who hold water rights in the river basin or segment of the river basin may appear before the commission and submit testimony and evidence relating to the need for appointment of a watermaster.
- (c) After the hearing, the commission shall make a written determination as to whether a threat exists to the rights of senior water rights holders in the river basin or segment of the river basin and shall issue an order either finding that a threat

exists and directing appointment of a watermaster or denying appointment of a watermaster.

The Petitioners have the burden of proof by a preponderance of the evidence,<sup>2</sup> and no party argues otherwise.

### III. PARTIES

The following are currently parties in this case and are primarily grouped by their position on granting the Petition:

<b>PARTIES</b>	<b>REPRESENTATIVES</b>
<b>Petitioners</b>	
GCWA	Molly Cagle and Paulina Williams
Dow	Fred B. Werkenthin, Jr.
NRG	Joe Freeland
Janes Gravel	Scott R. Shoemaker
Brazosport Water Authority (BWA)	Ronald Woodruff
I. J. Talbott	self
City of Cleburne	not specified
Chester E. Dixon	self
Arledge & Shannon, LP	not specified
<b>Protestants</b>	
City of Lubbock, City of Abilene, City of Stamford, West Central Texas Municipal Water District, North Central Texas Municipal Water Authority, and White River Municipal Water District (Upper Brazos Coalition)	Jason Hill
Bell County WCID No. 1, City of Harker Heights, City of Belton, City of Killeen, and City of Copperas Cove (Bell County Group)	David Tuckfield
Bradley B. Ware and William and Gladys Gavranovic, Jr. (BFFR)	Gwendolyn Hill Webb and Stephen P. Webb
Kacir-Wheeler LLC	Brent Wheeler

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<sup>2</sup> 30 Tex. Admin. Code § 80.17.

<b>PARTIES</b>	<b>REPRESENTATIVES</b>
JPMORGAN Chase Bank, N.A., as Trustee of the Mary Leonard Children's Trust, Miranda Leonard Trust III, Martha Leonard Trust III, and Madelon Leonard Trust III (Leonard Trusts)	W. Thomas Buckle
Dan Kacir	self
George Sidney Kacir	self
<b>Neutrals</b>	
BRA	Doug Caroom
City of Houston	Edmond R. McCarthy Jr., and Edmond R. McCarthy III
Luminant Generation Company	Elizabeth Townsend
<b>TCEQ</b>	
Office of Public Interest Counsel	James B. Murphy and Eli Martinez
ED	Ross Henderson

The Upper Brazos Coalition is a group of municipalities and water suppliers that are water right holders in the area of the Basin above Possum Kingdom Lake, which they refer to as the Upper Basin. They refer to the remainder of the Basin as the Lower Basin. These are not official terms. Rather, they are terms of convenience that have been adopted by the Upper Brazos Coalition.<sup>3</sup> For similar convenience, the ALJs will use the terms Upper Basin and Lower Basin in this PFD in the same way that the Upper Brazos Coalition uses them. The Upper Basin comprises perhaps one third of the geographic area of the entire basin.

#### IV. SCHEDULE

The following are the principal procedural events in this case:

<b>DATE</b>	<b>EVENT</b>
January 7, 2013	Petition filed with the Commission. <sup>4</sup>

<sup>3</sup> UBC Ex. 1 (O'Brien Direct) at 2-3; UBC Ex. 4 (Hibbs Direct) at 10-11.

<sup>4</sup> ED Ex. A at 20.

February 19, 2013	Commission referred the Petition to the State Office of Administrative Hearings (SOAH) for hearing. <sup>5</sup>
March 13, 2013	Notice of hearing mailed to all water right holders in the Basin. <sup>6</sup>
April 17, 2013	Preliminary hearing and discovery began.
September 23, 2013	Hearing on the merits began.
September 26, 2013	Hearing on the merits ended.
October 16, 2013	Deadline to file closing briefs and arguments.
October 25, 2013	Deadline to file responses to closing briefs and arguments.
December 17, 2013	Deadline to issue proposal for decision (PFD).

## V. JURISDICTION

No party disputes the adequacy of the notice of the hearing on the Petition.<sup>7</sup> The Proposed Order includes findings of fact and conclusions of law concerning those notices.

On April 17, 2013, ALJ William G. Newchurch conducted a preliminary hearing at which jurisdiction was proven and parties were admitted. On September 23, 2013, ALJ Newchurch and ALJ Hunter Burkhalter convened the hearing on the merits. The hearing on the merits concluded on September 26, 2013.

The Bell County Group, BFFR, the Leonard Trusts, Kacir-Wheeler LLC, Dan Kacir, and George Sidney Kacir contend that the Commission has no jurisdiction to grant the Petition because there no longer are 25 petitioners seeking the appointment of a watermaster. BFFR makes a closely related argument that the support of at least 25 water right holders is a required condition precedent before a petition for appointment of a watermaster may be granted. Kacir-Wheeler LLC contends there never were 25 original Petitioners and many signed the Petition because they were misled. Dan Kacir claims there are indications some Petitioners signed due to fraud and the Commission should investigate every signature on the Petition for accuracy.

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<sup>5</sup> ED Ex. A at 4-5, *AN INTERIM ORDER concerning the petition for appointment of a watermaster in the Brazos River Basin filed by the Brazos River Coalition*; TCEQ Docket No. 2013-0174-WR (Feb. 19, 2013).

<sup>6</sup> ED Ex. A.

<sup>7</sup> ED Ex. A.

The Aligned Parties and the ED maintain that the Commission has jurisdiction under § 11.451 of the Texas Water Code because there were more than 25 Petitioners when the Petition was filed. Based on their analysis of the wording of that statute and other types of cases involving petitions, they contend that jurisdiction, once established, is not lost if the number of petitioners later falls below the number originally required to confer jurisdiction.

The ALJs conclude that the Commission has jurisdiction to grant the Petition because it was originally filed by more than 25 holders of water rights in the Basin. They do not find that the Commission subsequently lost jurisdiction after some Petitioners withdrew, leaving less than 25 remaining.

**A. More Than 25 Water Right Holders Originally Petitioned For a Watermaster**

As originally filed, the Petition was signed by 37 Petitioners who hold water rights in the Basin.<sup>8</sup> No party questions that each of the original Petitioners holds a water right in the Basin. At the preliminary hearing, the Petition was admitted into evidence without objection to prove jurisdiction, and no one objected to either the Commission's or SOAH's jurisdiction.

Subsequently, many of the original Petitioners withdrew their requests for appointment of a watermaster. The table below shows all of the original Petitioners and indicates those who remain active Petitioners<sup>9</sup> and those who have withdrawn as Petitioners:

<b>Petitioner</b>	<b>Status</b>	<b>Certificate of Adjudication Nos.<sup>10</sup></b>
Dow	active	12-5328, 12-5322 & 12-5171
NRG	active	12-5320 & 12-5325
BWA	active	12-5366
I. J. Talbott, Trustee	active	12-5329

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<sup>8</sup> ED Ex. A at 20-39.

<sup>9</sup> Some active Petitioners did not participate in the hearing.

<sup>10</sup> Although the Petition refers to all of these as certificate of adjudication numbers, some of them appear to be water right permit numbers.



Petitioner	Status	Certificate of Adjudication Nos. <sup>10</sup>
GCWA	active	12-5168
Thomas Hicks	active	12-4133
Janes Gravel	active	12-3710
Richard D. Lundberg & Lundberg Farms	active	6-2294
Hugh W. Davis	active	2304
Jane H. Cravens	active	3460
Arledge & Shannon, LP	active	3773
Margie Kraemer, Kraemer Farms	active	4015
John Nigliazzo <i>et ux</i>	active	4145
Chester E. Dixon	active	2948 & 2949
City of Cleburne	active	4106A-C & 4258
Weldon S. Laas	withdrawn	12-5819
Richard T. Lietz Estate	withdrawn	12-4090
Charlie Ray Cockburn	withdrawn	12-4032
Don Weinacht <sup>11</sup>	withdrawn	12-4023
Keith David Lemons	withdrawn	12-3677
Joe D. Moore	withdrawn	12-3651
John R. Moore	withdrawn	12-3651
Nellie Earline Brooks Tomme	withdrawn	12-2964
W. T. Crumley	withdrawn	12-2229
Jim Hering	withdrawn	2310
P. D. Gunter	withdrawn	2818
J. B. Gunter	withdrawn	2819
L. T. Warlick	withdrawn	2875
Barry Siebenlist	withdrawn	2946
Louis Pitcock, Jr.	withdrawn	3457
Margaret Janes	withdrawn	3569
JFB Farms	withdrawn	3619
Frances Davis	withdrawn	3724
Harvest Quail, Inc.	withdrawn	4011
KHK Foggy Bottom Farms, Inc.	withdrawn	4016
Ted Higginbottom and Al David and Bill Kirk	withdrawn	4016
KL Nixon Estate	withdrawn	5278

Some water right holders filed duplicative requests for appointment of a watermaster. Ted Higginbottom signed the Petition three times: (1) once for himself, Al David Kirk, and Bill

<sup>11</sup> On August 13, 2013, Ellen Weinacht also filed a motion to withdraw as a Petitioner and party. While she was admitted as a party, the evidence does not show that she was a Petitioner.

Kirk as the holders of water right Permit No. 4016;<sup>12</sup> (2) a second time for KHK Foggy Bottom Farms, Inc. as the holder of water right Permit No. 4016;<sup>13</sup> and (3) once for Harvest Quail, Inc. as the holder of Permit No. 4011.<sup>14</sup> Texas Water Code § 11.451 seems to contemplate only one request per water right. Accordingly, the ALJs find that only one of the requests by the holders of Permit No. 4016 was valid. However, because Permit No. 4011 is a separate water right owned by a different entity, the ALJs find that Mr. Higginbottom's request on behalf of Harvest Quail, Inc. was valid. Additionally, both John R. Moore and Joe D. Moore signed the Petition as holders of Certificate of Adjudication No. 12-3651.<sup>15</sup> The ALJs find that only one of those requests was valid. Subtracting the two invalid requests, the ALJs find that there were 35 original Petitioners.

Kacir-Wheeler LLC, Dan Kacir, and the Bell County Group question the validity of other signatures shown on the Petition. Kacir-Wheeler LLC claims that some of the signatures were fraudulently added to the Petition. It even claims some of the signatures were for people who were deceased at the time they supposedly signed the Petition.

Kacir-Wheeler LLC points to no record evidence indicating that any of the original Petitioners was deceased when the Petition was signed. It is true that at least one original Petitioner was an estate: the Richard T. Lietz Estate (Lietz Estate), Certificate of Adjudication No. 12-4090.<sup>16</sup> That suggests that the holder of the water right was deceased when the Petition was signed. However, the ALJs see no reason why the Lietz Estate, which would have held the deceased's assets until they were distributed, could not petition on behalf of the water right the estate held. The Petition appears to have been signed on December 12, 2012, by Charlene Lietz as "owner, manager" of the Lietz Estate, making the estate a valid original Petitioner.

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<sup>12</sup> ED Ex. A at 32.

<sup>13</sup> ED Ex. A at 32.

<sup>14</sup> ED Ex. A at 33.

<sup>15</sup> ED Ex. A at 23, 28.

<sup>16</sup> ED Ex. A at 23.

The signatures of Ms. Lietz for the Lietz Estate and L. R. Nixon for K. L. Nixon are on the Petition.<sup>17</sup> They later withdrew and claimed they never signed the Petition. There is no evidence in the record, however, supporting their assertions that they did not sign. They did not testify, their withdrawal notices were not offered as or admitted into evidence, and there is no evidence that anyone else signed for them. Because the signed Petition is evidence showing the Lietz Estate and K. L. Nixon were original Petitioners and there is no evidence showing the signatures for them were fraudulently added, the ALJs conclude that the Lietz Estate and K. L. Nixon were originally Petitioners.

After the hearing, documents were filed in the case claiming seven original Petitioners were misled into signing the Petition. On October 16, 2013, the Bell County Group filed a motion to reopen the record to admit three affidavits that appear to have been signed by original Petitioners who claimed they were misled into signing the Petition.<sup>18</sup> The affidavits concern a total of four original Petitioners beyond those already found invalid.<sup>19</sup> The Aligned Parties objected to reopening the record to admit the affidavits. The ALJs sustained most of the objections, and none of the three affidavits was admitted into evidence. After the hearing, three other original Petitioners filed affidavits claiming they were misled into signing the Petition.<sup>20</sup> Those affidavits were not offered as or admitted into evidence.

Because there is no evidence to support a finding that some Petitioners were misled into signing, the ALJs need not analyze the underlying law. That is, the ALJs do not analyze whether a signature on the Petition from a water right holder who had been misled into signing it should be considered legally valid.

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<sup>17</sup> ED Ex. A at 23, 35.

<sup>18</sup> The affidavits appear to have been signed by John M. Weaver, who signed the Petition for JFB Farms; L. R. Nixon, who signed for K. L. Nixon; and Ted Higginbottom, who signed three times as previously described. ED Ex. A at 32, 33, 35, 36.

<sup>19</sup> Because the ALJs find above that one of the requests for a watermaster signed by Mr. Higginbottom on the Petition was duplicative and invalid, the claim that he was misled into signing would put only the other two requests into question.

<sup>20</sup> Charlie Ray Cockburn, Florence Davis, and Louis Patrick are original Petitioners and submitted affidavits claiming they were misled into signing. Richard Janes filed a similar affidavit, but his name is not on the Petition as an original Petitioner.

Even if the evidence showed that Ms. Lietz and Mr. Nixon did not sign the Petition and seven other Petitioners were misled into signing and those facts rendered all nine of those Petitioners legally invalid, the number of remaining original Petitioners would fall from 35 to 26. There would still have been more than 25 valid original Petitioners, and the Commission would still have acquired jurisdiction.

Prior to the hearing, Dan Kacir filed a motion asking the ALJs to poll the Petitioners and re-examine the accuracy of every signature on the Petition. The ALJs denied that motion. In post-hearing argument, Mr. Kacir similarly argues that the Commission should poll all the Petitioners and investigate the validity of the signatures on the Petition. The ALJs recommend that the Commission deny that motion. The Commission and the ALJs are required to neutrally determine the law and facts and apply the law to the facts. Mr. Kacir's motion asks the Commission and ALJs to assume a very different role and develop evidence to support one side in the dispute before it. No law provides for the Commission and the ALJs taking that role.

Based on the evidence, the ALJs find that there were 35 original Petitioners, more than the 25 required by § 11.451 of the Texas Water Code to give the Commission jurisdiction over this matter.

**B. The Commission Retains Jurisdiction Even Though Some Petitioners Withdrew**

Because the Petition is no longer supported by 25 or more holders of water rights in the Basin, the Bell County Group and other parties claim that the Commission has no jurisdiction to grant the Petition. They claim the plain language of Texas Water Code § 11.451 requires 25 petitioners as a condition precedent to the appointment of a watermaster and the Legislature intended that an appointment have at least that level of support. They argue that the Commission

would be impermissibly exceeding its statutory authority if it appointed a watermaster without the support of 25 holders of water rights in the Basin.<sup>21</sup>

Prior to the hearing on the merits, the Bell County Group filed a motion for summary disposition (MSD) that similarly disputed the Commission's jurisdiction. Dan Kacir, the Leonard Trusts, and BFFR supported the MSD. The Aligned Parties and the ED opposed the MSD. The ALJs agreed with the legal analyses of the ED and the Aligned Parties, concluded that the Commission had not lost jurisdiction, and denied the MSD.<sup>22</sup>

The Aligned Parties and the ED argue that the plain language of Texas Water Code § 11.451 allows the Commission to authorize the ED to appoint a watermaster for a river basin “[o]n petition of 25 or more holders of water rights . . . in a river basin . . . .” They contend that the common meaning of “petition” is “a formal written request”;<sup>23</sup> hence, the Commission's jurisdiction was established when the petition signed by 25 or more holders of water rights was filed with the Commission. They also note that nothing in the Texas Water Code specifically states or suggests that the Commission loses jurisdiction if some petitioners later withdraw and less than 25 remain. Instead, Texas Water Code § 11.452 requires the Commission, “[o]n receiving a petition for appointment of a watermaster,” to call and hold a hearing in order to determine whether a threat exists to senior water right holders in the basin, determine if a watermaster is needed in the basin or a segment of it, and appoint a watermaster if such threat and need exist.

Words and phrases in a state code must be read in context and construed according to the rules of grammar and common usage unless they have acquired a technical or particular meaning

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<sup>21</sup> The Bell County Group and BFFR concede that Tex. Water Code § 11.451 authorizes the Commission on its own motion to direct the ED to appoint a watermaster for a river basin if the Commission finds that the rights of senior water rights holders in the basin or a segment of the basin are threatened. They note, however, that the Commission has not made such a motion for any portion of the Brazos River Basin and has specifically declined to make one in the past.

<sup>22</sup> Order No. 20 (Sep. 11, 2013).

<sup>23</sup> *Black's Law Dictionary* 1182 (8<sup>th</sup> ed. 2004).

by legislative definition or otherwise.<sup>24</sup> There is no evidence that the phrase “[o]n petition of 25 or more holders of water rights . . . in a river basin,” as used in § 11.451, has a technical or particular meaning. “On” is used as a function word to indicate a time frame during which something takes place.<sup>25</sup> A common meaning of “petition” that best fits in this context is “a formal written request made to an official person or organized body (as a court).”<sup>26</sup> Thus, the ALJs conclude that the Commission acquired jurisdiction when more than 25 holders of water rights in the Basin filed the formal written request with the Commission for appointment of a watermaster.

The ALJs do not agree with the claim of the Bell County Group and others that § 11.451 conditions the Commission’s jurisdiction on the continuing support of at least 25 holders of water rights for appointment of a watermaster. Nor do the ALJs agree with the closely related argument of BFFR and others that the support of at least 25 holders of water rights in the Basin is a condition precedent to appointment of a watermaster. The Texas Water Code does not specifically require the Commission to find that 25 or more holders of water rights still support the appointment of a watermaster at the time the Petition is granted. Instead, §§ 11.451 and 11.452 list only two things the Commission must find before directing the ED to appoint a watermaster: (1) the rights of senior water right holders in the basin or a segment of the basin are threatened, and (2) there is a need for appointment of a watermaster for the river basin or a segment of the river basin.

No party points to any prior Commission decision or judicial opinion concerning the Commission’s jurisdiction under Texas Water Code §§ 11.451 and 11.452 when some petitioners have withdrawn. However, the Aligned Parties contend one Commission decision<sup>27</sup> and two

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<sup>24</sup> Tex. Gov’t Code § 311.011(a), (b).

<sup>25</sup> “On.” Merriam-Webster.com. Accessed October 30, 2013. <http://www.merriam-webster.com/dictionary/on>.

<sup>26</sup> “Petition.” Merriam-Webster.com. Accessed October 30, 2013. <http://www.merriam-webster.com/dictionary/petition>.

<sup>27</sup> *Petition Appealing the Retail Water Rates and Tariff Provisions of the South Buda Water Control and Improvement District No. 1*, TCEQ Docket No. 2011-0737-UCR, SOAH Docket No. 582-11-5999 (Final Order) (Jan. 12, 2012) (concerning a petition for review of retail water utility rates).

judicial opinions<sup>28</sup> concerning petitions for other types of governmental actions support their contention that the Commission has not lost jurisdiction in this case. The ALJs conclude that the cited cases are not precedents applicable to the current case because the jurisdictional statutes applicable to them are different from the one applicable to the current case.

To the extent the Commission might nevertheless choose to look for guidance in the cases that the Aligned Parties cite, one of them indicates that the general rule of law regarding adding and withdrawing names on petitions is that the right to withdraw exists up to the time the officials act on the petition, which can be as early as the date on which the required public notice is given.<sup>29</sup> On January 29, 2013, the Commission's Chief Clerk sent notice to the original Petitioners that the Commission would consider the Petition and whether to refer it to SOAH for hearing at its meeting on February 13, 2013.<sup>30</sup> At the meeting, the Commission found the Petition was signed by more than 25 water right holders and referred it to SOAH for hearing.<sup>31</sup> None of the 35 valid original Petitioners withdrew before June 3, 2013,<sup>32</sup> which was 125 days after the notice that the Commission would consider the Petition and 110 days after the Commission considered the Petition and referred it to hearing.<sup>33</sup> Thus, there were more than 25 Petitioners when the Commission first acted on the Petition.

Finally, the statutory context does not support the claim by some parties that Texas Water Code § 11.451 conditions the Commission's power to authorize appointment of a watermaster on

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<sup>28</sup> *Texas Power & Light Co. v. Brownwood Public Service Co.*, 87 S.W.2d 557, 1935 Tex. App. LEXIS 1172 (Tex. Civ. App. 1935, no writ) (concerning a citizen petition to a city for an election to consider setting aside the city's award of a utility franchise); *Clear Creek Independent School Dist. v. Commissioner of Education*, 775 S.W.2d 490, 1989 Tex. App. LEXIS 2339 (Tex. App. Austin 1989, no writ) (concerning a citizen petition for detachment of a geographic area from one school district and its annexation to another school district).

<sup>29</sup> *Clear Creek*, 775 S.W.2d at 494.

<sup>30</sup> In accordance with Tex. Gov't Code § 2001.090, 30 Tex. Admin. Code § 80.127(a)(1), & Tex. R. Evid. 201, the ALJs take official notice of the agenda and attachments for the Commission's February 13, 2013 meeting. [http://www.tceq.texas.gov/assets/public/comm\\_exec/agendas/comm/marked/2013/130213.Mrk.pdf](http://www.tceq.texas.gov/assets/public/comm_exec/agendas/comm/marked/2013/130213.Mrk.pdf). Any objection to this taking of official notice should be filed as an exception to this PFD.

<sup>31</sup> ED Ex. A at 4-5. The order was issued on February 19, 2013.

<sup>32</sup> Charlie Ray Cockburn and Nellie Earline Brooks Tomme filed motions to withdraw as Petitioners on June 3, 2013.

<sup>33</sup> ED Ex. A at 1, 3.

the current support of 25 or more holders of water rights. That is because the same statute empowers the Commission on its own motion to authorize the ED to appoint a watermaster even if no holder of a water right has petitioned for or supports the appointment.

The ALJs conclude that the Commission has jurisdiction to consider the Petition and to grant the Petition if the Commission makes other required findings, which are addressed below.

## VI. THE MERITS

As explained above, the Commission may authorize the appointment of a watermaster in this case if it: (1) finds “that the rights of senior water right holders in the basin or segment of the basin are threatened;”<sup>34</sup> and (2) determines that “a need exists for appointment of a watermaster for the river basin or segment of the river basin.”<sup>35</sup> It is also obvious from the quoted statutory language that the Commission may choose to appoint a watermaster for the entire Basin or for only a segment of the Basin. Thus, the three fundamental issues that must be analyzed in this case are: (1) whether senior water rights are threatened in the Basin; (2) whether a need exists for a watermaster in the Basin; and, if the first two questions are answered in the affirmative, (3) whether the watermaster should be appointed for the entire Basin or only one or more segments of the Basin.

The opponents to appointment of a watermaster have consistently taken the position that such appointment should only occur in rare circumstances. That is, the opponents contend that the proponents of a watermaster should have a high hurdle to overcome in order to have one appointed. As will be discussed further elsewhere in this PFD, the ALJs do not agree with this position. The applicable statutes do not indicate that appointment of a watermaster should be viewed as disfavored or difficult. Moreover, the statutes provide for no less than four circumstances in which a watermaster may be appointed:

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<sup>34</sup> Tex. Water Code § 11.451.

<sup>35</sup> Tex. Water Code § 11.452(a).



- Pursuant to Texas Water Code § 11.326, the ED may appoint a watermaster for a water division of the state, without any consideration given to threat or need, and without any hearing;
- Pursuant to Texas Water Code § 11.402, a court may appoint a watermaster;
- Pursuant to Texas Water Code § 11.451, the Commission may, on its own initiative, appoint a watermaster after a finding of threat and need; and
- Pursuant to Texas Water Code § 11.451, the Commission may, upon receiving a petition from 25 or more water right holders, appoint a watermaster after a finding of threat and need.

This suggests to the ALJs that appointing a watermaster was never intended to be an especially difficult, or disfavored, thing to do.

**A. Threat**

**1. The Definition of Threat Used in the Concho River Case is Reasonable and Should Likewise be Used Here.**

Pursuant to Texas Water Code § 11.451, the Commission must determine whether the rights of senior water right holders in the basin or segment of the basin are “threatened.” However, the statute does not define “threatened,” and the parties disagree as to how the word should be defined and applied in this case.

The Aligned Parties argue that the word should be interpreted consistent with its common usage, such that “threatened” means the “possibility of harm,” but does not require “a showing of *actual* harm.”<sup>36</sup> Along the same lines, the Aligned Parties argue in favor of the use of the same definition of threat that was used by the Commission in the contested case hearing which

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<sup>36</sup> Aligned Parties’ Closing Br. at 5 (emphasis in original).

considered the appointment of a watermaster for the Concho River.<sup>37</sup> In the Concho River case, the Commission adopted the following Conclusions of Law:

4. “Threat” to the rights of senior water rights holders as used in Chapter 11, Subchapter I, of the Water Code implies a set of circumstances creating the possibility that senior water rights holders may be unable to fully exercise their rights—not confined to situations in which other people or groups convey an actual intent to harm such rights. Specifically, in time of water shortage, the rights of senior water rights holders in the basin are threatened by the situation of less available water than appropriated water rights; the disregard of prior appropriation by junior water rights holders; the storage of water; and the diversion, taking, or use of water in excess of the quantities to which other holders of water rights are lawfully entitled.
5. The terms “threats” and “threaten” as used in Chapter 11, Subchapter I, of the Water Code do not require a menace to be communicated to another and an intent to injure, although such a communication certainly would constitute a subset of real threats within the broader range of conditions that are legitimate threats.
6. The context of Chapter 11, Subchapter I, of the Water Code does not demand that, before the rights of senior rights holders are threatened, senior water rights holders must make calls for water on junior water rights holders and then junior water rights holders must either fail or refuse to comply with the calls.<sup>38</sup>

As recently as September 14, 2012, the Commission reaffirmed its support for the definition of threat it used in the Concho River case.<sup>39</sup> Similarly, this is the definition that was used by the ED when he evaluated the need for a watermaster for the Basin in the present case.<sup>40</sup>

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<sup>37</sup> The Commission’s final order appointing a watermaster for the Concho River was appealed. While the appeal was pending the Legislature enacted a statute creating a watermaster for the Concho River Basin. Acts 2005, 79<sup>th</sup> Leg., Ch. 749, Sec. 1, eff. September 1, 2005. *See* Subchapter K of Chapter 11 of the Tex. Water Code.

<sup>38</sup> Order Appointing a Watermaster for the Concho River Segment, TCEQ Docket No. 2000-0344-WR, SOAH Docket No. 582-02-2130 (Aug. 17, 2004) (the “Concho Final Order”).

<sup>39</sup> *See* ED Ex. Hooper-7 at 4.

<sup>40</sup> ED Ex. Alexander-1 at 6.

The Aligned Parties consider this definition to be “sound precedent” from which “there is no good cause to diverge,”<sup>41</sup> and the ED agrees.<sup>42</sup>

The Protestants all oppose the use of the definitions from the Concho River case, arguing that it sets the bar too low. That is, the Protestants contend that the definition of threat advocated by the Aligned Parties and the ED is so minimal as to be meaningless. According to the Bell County Group, under the definition, every basin in the state would qualify as threatened, which would effectively render the process for designating a watermaster meaningless.<sup>43</sup> Dan Kacir also disagrees with the Concho River definition.<sup>44</sup>

A quoted above, the Concho River definition includes the following sentence:

Specifically, in time of water shortage, the rights of senior water rights holders in the basin are threatened by the situation of less available water than appropriated water rights; the disregard of prior appropriation by junior water rights holders; the storage of water; *and* the diversion, taking, or use of water in excess of the quantities to which other holders of water rights are lawfully entitled.<sup>45</sup>

The Bell County Group points to the word “and” that is italicized in the above-quoted language and contends that all four factors listed in the sentence must be present in order for a threat to be established.<sup>46</sup>

BFFR also disagrees with the definition of threat used in the Concho River case. BFFR advocates for a standard that would require:

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<sup>41</sup> Aligned Parties Closing Br. at 6.

<sup>42</sup> ED Closing Br. at 4-5.

<sup>43</sup> Bell County Group Closing Br. at 15-16.

<sup>44</sup> D. Kacir Closing Br. at 1.

<sup>45</sup> Emphasis added.

<sup>46</sup> Bell County Group Closing Br. at 18-19.

[A] clear showing that the *existing system* of water rights management had *failed* to provide sufficient protection for senior water rights holders in a particular basin to the point where such water rights holders had failed to acquire adequate water under their water rights *even when they used the tools already available to them.*<sup>47</sup>

In addition, BFFR advocates the following definition of threat: “A set of demonstrated circumstance[s] where existing senior water rights holders are unable to reliably utilize their water rights using all administrative tools and petitions now available from the TCEQ.”<sup>48</sup>

The Upper Brazos Coalition describes the definition from the Concho River case as merely a “ceremonial” requirement that a proponent of appointing a watermaster would always be able to prove.<sup>49</sup> Scott Hibbs provided expert testimony on this topic for the Upper Brazos Coalition. Mr. Hibbs is a registered professional engineer who works as a consultant on water resource issues. Mr. Hibbs offered the opinion that, under the Concho River definition, an entity opposing appointment of a watermaster would have an almost impossible task: proving “that there are no set of circumstances whatsoever, real or theoretical, where senior water rights in the basin may be unable to fully exercise their water rights.”<sup>50</sup>

The Upper Brazos Coalition advocates for a more “robust assessment” to determine whether a threat exists. It begins by advocating for differing standards of threat based upon location in the Basin. Mr. Hibbs points out that the Brazos River is quite long and encompasses very different eco-regions and climatological zones. Its lower reaches receive average annual rainfalls of 40 to 50 inches per year, while its uppermost reaches receive only 18 inches per year or less.<sup>51</sup> Mr. Hibbs explains: “What constitutes average river conditions in the Upper Basin would be regarded as catastrophic river conditions in the Lower Basin. Conditions that constitute a ‘threat’ in the Lower Basin might very well be conditions that would be cheered by

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<sup>47</sup> BFFR Closing Br. at 7 (emphasis in original).

<sup>48</sup> BFFR Closing Br. at 7. The ALJs presume that, when referencing “all administrative tools and petitions now available from the TCEQ,” BFFR’s intent is to refer only to such tools and petitions *other than* a watermaster.

<sup>49</sup> Upper Brazos Coalition Closing Br. at 5.

<sup>50</sup> UBC Ex. 4 (Hibbs Direct) at 21.

<sup>51</sup> UBC Ex. 4 (Hibbs Direct) at 6.

diverters and impounders in the Upper Basin.”<sup>52</sup> Thus, the Upper Brazos Coalition advocates applying a different standard for “threat” in the Upper Basin than in the Lower Basin.<sup>53</sup> The Upper Brazos Coalition explains the additional analysis it believes is required in order to determine whether a threat exists. Specifically, the Upper Brazos Coalition would seek answers to an extensive list of questions:

(1) Have there have been instances where any water rights in the basin—or basin segment—have been unsatisfied?

If so:

(2) How many rights were unsatisfied?

(3) Do the occurrences suggest isolated or widespread problems?

(4) When were the deficiencies observed?

(5) Were there repeat occurrences of water shortages?

(6) How were the shortages documented? By a formal complaint to the TCEQ?

(7) Did the shortages result in a priority call?

(8) If there was a priority call, what was the outcome?

(9) Did the TCEQ undertake enforcement action?

(10) Were the priority calls honored or were they deemed futile?

(11) If a call was honored, how long was it in effect, what parts of the basin were subject to the call, and were additional measures required to curtail diversions?

(12) Even if a threat is found, is a watermaster the “only effective tool” for addressing the threat, or might the TCEQ be able to resolve it using its existing staffing and oversight structure?<sup>54</sup>

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<sup>52</sup> UBC Ex. 4 (Hibbs Direct) at 21-22.

<sup>53</sup> UBC Ex. 4 (Hibbs Direct) at 22.

<sup>54</sup> Upper Brazos Coalition Closing Br. at 6; UBC Ex. 4 (Hibbs Direct) at 22-24.

The Upper Brazos Coalition correctly points out that, because §§ 11.451 and 11.452 both reference a river basin or segments thereof, a finding of a threat in one segment does not necessarily mean that a similar threat exists in other segments of the same river.<sup>55</sup>

The ALJs join the Aligned Parties and the ED in concluding that it is reasonable and appropriate to interpret the term “threat” consistently with the existing precedent from the Concho River case. As commonly defined, a “threat” is as “an indication of something impending.”<sup>56</sup> As pointed out by the Aligned Parties,<sup>57</sup> the Texas Legislature has distinguished between actual harm and threatened harm in other contexts.<sup>58</sup> Thus, if it had intended to require a showing of actual harm in order to appoint a watermaster, the Legislature could have done so. The fact that it did not indicates its intent that a showing of actual harm is not required to appoint a watermaster. For this reason, the ALJs agree with the Aligned Parties that it is not necessary to show that senior water right holders have suffered actual harm in order to prove that their rights are threatened.

It is for the same reason that the ALJs reject all of the alternative standards proposed by the Protestants. Rather than requiring a showing that senior water right holders are facing a *risk* of harm, all the Protestants would, to greater or lesser degrees, require a showing that harm to the senior water rights is an *accomplished fact*. For example, BFFR would require a showing that senior water right holders have been unable to fully utilize their rights despite availing themselves of all the tools available to them from the TCEQ other than a watermaster.

The Upper Brazos Coalition would go much further, requiring an extensive showing that there have been multiple instances in which senior water right holders have been unable to fully utilize their rights. It advocates a multi-pronged inquiry into the extent and frequency that senior

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<sup>55</sup> Upper Brazos Coalition Closing Br. at 5.

<sup>56</sup> Webster’s Ninth New Collegiate Dictionary at 1128-29.

<sup>57</sup> Aligned Parties Closing Br. at 6.

<sup>58</sup> See, e.g., Tex. Water Code § 26.3511 (authorizing corrective action in the event of “a release or a threatened release” from an underground storage tank); Tex. Health & Safety Code §§ 361.272, 361.273 (authorizing corrective action for actual or threatened releases of solid waste).

water rights have been harmed, how effectively the ED has dealt with the harm, and so on. In other words, the Upper Brazos Coalition's position is that senior water right holders must suffer multiple rounds of actual harm before a finding can be made that their rights are threatened. The ALJs do not believe this interpretation is either required or suggested by the terms of the statute.

The ALJs also reject the Upper Brazos Coalition's contention that the standard for what constitutes a threat should vary based upon location in the Basin. There is nothing in the statutory language to suggest that there should be different threat standards for "wet" eastern Texas and "dry" western Texas. The Upper Brazos Coalition's central premise is that, because rainfall in the Upper Basin is scant and unpredictable, there should be a greater reluctance to impose a watermaster upon that region than in the rest of the Basin. In this regard, the ALJs believe that the coalition has it exactly backwards. According to the Upper Brazos Coalition's own expert witness, Mr. Hibbs: "What constitutes average river conditions in the Upper Basin would be regarded as catastrophic river conditions in the Lower Basin. Conditions that constitute a 'threat' in the Lower Basin might very well be conditions that would be cheered by diverters and impounders in the Upper Basin."<sup>59</sup> In other words, water rights, including senior water rights, are more precarious and vulnerable in the dry Upper Basin than in the remainder of the Basin. Stated differently, all other factors being equal, senior water rights in the Upper Basin are more, not less, likely to be threatened than elsewhere in the Basin.

The ALJs also reject an implicit presumption found in the alternative definitions of threat offered by the Protestants. The Protestants would require a showing not only that senior water rights have suffered shortages, but also that TCEQ efforts to deal with the shortages (such as by issuing priority calls or taking enforcement efforts) have been unsuccessful. Implicit in this approach is the presumption that priority calls and TCEQ enforcement efforts are the preferred approach for managing water rights and that appointing a watermaster should be a last resort if the preferred approach proves to be unsuccessful. The ALJs detect no such legislative intent in the Texas Water Code. That is, there is no indication from the text of the Texas Water Code that

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<sup>59</sup> UBC Ex. 4 (Hibbs Direct) at 21-22.

management of water rights through the use of a watermaster should be viewed as less desirable than management through any other mechanism, or was only meant to be utilized as a last resort.

The ALJs reject the Bell County Group's argument that, because the word "and" (instead of "or") was used in the second sentence of the definition of "threat" from the Concho River case, all four factors listed in the sentence must be present in order for a threat to be established. The ALJs conclude that the use of "and" instead of "or" was, if anything, the product of inartful wording. The ALJs do not believe the Commission, in the Concho River case, intended to require a showing of all four factors in order to find a threat, because any one of the factors could obviously create a threat to senior water rights. Stated differently, senior water rights can be threatened by less available water than appropriated water rights, *or* the disregard of prior appropriation by junior water right holders, *or* the storage of water in excess of the quantities to which other holders of water rights are lawfully entitled, *or* the diversion, taking, or use of water in excess of the quantities to which other holders of water rights are lawfully entitled.

Finally, the ALJs reject the argument that the definition from the Concho River case is so minimal as to be meaningless, such that every basin in the state would qualify as threatened. The definition of "threat" used in the Concho River case incorporates a number of reasonable factors to be considered in determining whether senior rights are threatened. The plain language indicates that the threat must be a real, not a remote, possibility. Moreover, the finding of threat is not the only requirement that must be met in order to appoint a watermaster. The Commission must also conclude that there is a need for the watermaster. As discussed below, the analysis of need incorporates other considerations.

For these reasons, the ALJs find the definition of "threat" used in the Concho River case provides reasonable guidance for this case.



## **2. The Rights of Senior Water Right Holders in the Basin are Threatened**

### **a. Background**

#### **(1) The Prior Appropriation Doctrine**

In order to analyze the threat issue, it is helpful to review what water rights are and how they are administered and managed in Texas. A water right is the right to appropriate surface water for beneficial use. It is a usufructuary right to divert and use state water and a vested property right of the water right holder.<sup>60</sup> The central premise of water rights in Texas is: “as between appropriators, the first in time is the first in right.”<sup>61</sup> This central premise, commonly referred to as the “prior appropriation doctrine,” utilizes the concept of junior and senior water rights. Each water right issued by the state is given a priority date. Thus, for example, a water right with a priority date of January 1, 1950 is “senior” to all rights with a later priority date and “junior” to all rights with an earlier priority date.<sup>62</sup> The prior appropriation doctrine, which is administered on the basis of seniority, is the essential element of water rights in Texas because it determines how water is to be allocated among water rights in times of shortage.<sup>63</sup> Thus, in times of shortage, each water right holder may make his authorized diversion only if sufficient water would still be available to satisfy all downstream water rights senior to his.<sup>64</sup>

Water rights issued by the TCEQ contain the following provision (or similar verbiage) that expressly advises the holder of its obligation to comply with the prior appropriation doctrine: “This [certificate of adjudication or permit] is issued subject to senior and superior water rights

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<sup>60</sup> *Texas Water Rights Comm’n v. Wright*, 464 S.W.2d 642, 647 (Tex. 1971).

<sup>61</sup> Tex. Water Code § 11.027.

<sup>62</sup> GCWA Ex. 200 (Furnans Direct) at 9-10.

<sup>63</sup> ED Ex. Alexander-1 (Alexander Direct) at 6-7; Aligned Parties Closing Br. at 3.

<sup>64</sup> Dow Ex. 200 (Brandes Direct) at 9.

in the Brazos River Basin.”<sup>65</sup> This verbiage puts each water right holder on notice that it is obligated to ensure that its water usage does not result in water rights senior to its water right going unsatisfied.

The TCEQ also provides guidance materials to water right holders to clarify this point. For example, in 2009, the agency published Guidance Document Number GI-228, *Rights to Surface Water in Texas* (TCEQ Guidance Document), in an effort to “explain basic water-rights law clearly.”<sup>66</sup> A number of excerpts from the document are illuminating.

- [Water rights] have an assigned priority *date*. This date determines your place in line for available water.<sup>67</sup>
- [Water rights] “do not guarantee that this water will always be available to you.”<sup>68</sup>
- [E]ach appropriated water right is like a ticket for a place in line for available water. If you hold an appropriated water right, then to know whether surface water is available to you at any given time, you would have to be able to answer these four key questions:
  - Where am I in line?
  - Is this water reserved for someone else?
  - Is any of the water I see available to me?
  - Should I be seeing more water?<sup>69</sup>
- A senior diversion right has a priority date earlier than the priority date of your diversion right, and whoever holds that right is ahead of you in line.<sup>70</sup>
- **Is any of the water I see available to me?** To answer this question, first look *upstream* to make sure that the water is not a reservoir release of sold water. To complete the answer, look *downstream*. Your goal is to determine how much

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<sup>65</sup> See e.g., the water rights of the members of the Upper Brazos Coalition at UBC Ex. 2 at 1, 4, and 6 (City of Abilene); UBC Ex. 2 at 8 (City of Lubbock); UBC Ex. 2 at 10 (City of Stamford); UBC Ex. 2 at 12 (N. Central Texas MWD); UBC Ex. 2 at 13 (W. Central Texas MWD); UBC Ex. 2 at 16 (White River MWD).

<sup>66</sup> GCWA Ex. 202 at 3.

<sup>67</sup> GCWA Ex. 202 at 6.

<sup>68</sup> GCWA Ex. 202 at 6.

<sup>69</sup> GCWA Ex. 202 at 7.

<sup>70</sup> GCWA Ex. 202 at 8 (emphasis in original).

water is needed, in terms of flow rate, to make water available to all downstream users who are ahead of you in line for the available water. (It is highly unlikely that you will have easy access to all of the information you need to calculate this flow rate.) You do not have the right to divert water from the stream if doing so will cause the streamflow to fall below this flow rate. . . . [I]f the users ahead of you in line intend to use their appropriate volumes, then you must not prevent that water from reaching them.<sup>71</sup>

The problem with the prior appropriation doctrine is that it is very difficult for water right holders to, on their own, ensure compliance with the doctrine's requirements. Thus, three different approaches have evolved for protecting water rights: (1) what the TCEQ Guidance Document calls the "honor system;" (2) enforcement by the ED's regular staff (Regular Staff) on an ad hoc basis; and (3) appointing a watermaster.<sup>72</sup>

**(2) The Methods by Which the Prior Appropriation Doctrine is Enforced**

**(a) The Honor System**

The TCEQ Guidance Document explains the honor system as follows:

Under the honor system, the idea is that water users will obey the conditions of their water rights without supervision and cooperate with one another as they divert water from the river. Users have to know what their right allows them to take—and then take no more than that amount.<sup>73</sup>

The advantage of the honor system is its low enforcement cost. However, the disadvantages are more numerous: "water is seldom plentiful," "water users have no reliable way to know how much of the water flowing by is theirs to divert or impound and how much they must allow to pass to senior-right holders downstream," "it is hard to tell who is following the law," "no one is permanently in place to monitor river conditions, pumping volumes, and the

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<sup>71</sup> GCWA Ex. 202 at 11-12 (emphasis in original).

<sup>72</sup> GCWA Ex. 202 at 13.

<sup>73</sup> GCWA Ex. 202 at 14.

volume of available water,” and “no one is charged with anticipating water shortages and warning water users in advance.”<sup>74</sup>

The evidence demonstrates that, as a practical matter, the honor system cannot protect senior water rights in a basin where many water rights have been granted. According to Dow witness Robert Brandes, Ph.D., P.E., in the absence of a watermaster or a TCEQ order enforcing a priority call, each water right holder exercises its water rights to the fullest, without regard to the needs of senior water rights or the requirements of the prior appropriation doctrine. Outside a watermaster area, there is no data collection system in existence that provides the necessary real-time data that would enable each water right holder to know whether it can divert water without impairing senior rights.<sup>75</sup>

**(b) Enforcement on an Ad Hoc Basis by Regular Staff**

In recent years, Regular Staff has increasingly been required to enforce and administer water rights in the absence of a watermaster. This is generally handled by various TCEQ departments, such as the Office of Compliance and Enforcement, the Office of Water, and the Small Business and Environmental Assistance Division.<sup>76</sup> Regular Staff does not actively enforce the prior appropriation doctrine on a day-to-day basis. Instead, it typically enforces only in a reactive mode, in response to a complaint or “priority call” by a water right holder who believes it is the victim of out-of-priority diversions by junior water right holders.<sup>77</sup>

The two ways a senior water right holder can call on Regular Staff to enforce its seniority are by making what is referred to as a “priority call” to the TCEQ, and by filing an enforcement complaint against another water right holder.<sup>78</sup> By making a priority call, the senior water right

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<sup>74</sup> GCWA Ex. 202 at 14-15.

<sup>75</sup> Dow Ex. 200 (Brandes Direct) at 16-17.

<sup>76</sup> ED Ex. Hooper-1 (Hooper Direct) at 10.

<sup>77</sup> Dow Ex. 200 (Brandes Direct) at 15-16.

<sup>78</sup> GCWA Ex. 200 (Furnans Direct) at 13; ED Ex. Alexander-1 (Alexander Direct) at 8.

holder asks the TCEQ to notify upstream junior rights that they should refrain from making diversions so that water to which the senior right is entitled can flow downstream to satisfy the senior right.

When it receives a priority call, Regular Staff performs an analysis using the agency's Water Availability Model (WAM) to determine whether additional water could be made available for the water right holder who issued the priority call by suspending junior water rights. After considering an extensive number of variables, Regular Staff determines whether to suspend any water rights. It then recommends a priority suspension date based upon the point in time at which additional water produced by the junior suspensions will exceed the amount of water that could be diverted by water rights senior to the holder making the priority call. If Regular Staff decides to suspend water rights in response to the priority call, the ED issues a Suspension or Adjustment Order.<sup>79</sup>

**(c) Watermaster**

There are currently three watermaster programs in Texas:

- the Rio Grande Watermaster manages most of the Rio Grande basin;<sup>80</sup>
- the South Texas Watermaster manages the Nueces, San Antonio, Guadalupe, and Lavaca River basins; and
- the Concho Watermaster manages the Concho River segment of the Colorado River basin.<sup>81</sup>

Because of its location on an international border, water rights on the Rio Grande River invoke issues of federal and international law. Therefore, the Rio Grande Watermaster does not

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<sup>79</sup> ED Ex. Alexander-1 (Alexander Direct) at 8-11.

<sup>80</sup> 30 Tex. Admin. Code § 303.1.

<sup>81</sup> ED Ex. Hooper-1 (Hooper Direct) at 6-7.

allocate water exclusively on the basis of the prior appropriation doctrine.<sup>82</sup> For this reason, the Rio Grande Watermaster's practices are of limited value for evaluating how a watermaster might act in the Brazos River Basin. It is, however, useful to look to the practices of the South Texas and Concho watermasters as a possible template for how a Brazos River Watermaster might function.

According to Cynthia Hooper, the ED's Program Liaison for the Watermaster Section at the TCEQ, the overarching objective of the South Texas and Concho watermasters is to allocate water between water right holders on the basis of priority, while maximizing beneficial use of water and minimizing waste. On a day-to-day basis, they conduct river investigations, measure stream flows and reservoir levels, meet with and answer questions from water right holders, investigate complaints, conduct enforcement against violators, and gather and store water use data. The watermasters require each water right holder to file a "declaration of intent to divert" (DOI), which states how much water the holder intends to divert and when it intends to divert it. Using the data at his disposal, the watermaster then determines whether the proposed diversion will remove water that rightfully belongs to a senior right. If so, the watermaster will notify the holder that it must reduce its diversions or stop diverting altogether. Watermasters also coordinate diversions within their jurisdictions. For example, a water right holder might notify the watermaster when it plans to release water from a reservoir for downstream diversion. The watermaster can then monitor downstream usage to ensure that the released water reaches the intended recipient.<sup>83</sup>

#### **b. Evidence Presented**

Not surprisingly, the proponents of a watermaster in the Basin contend that senior rights are threatened there, and they presented substantial evidence documenting those threats. Dow owns a major manufacturing facility located in Freeport, Texas. Daily demand for Brazos River water at the Dow's Freeport facility ranges from 230 to 240 cubic feet per second (cfs). Dow

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<sup>82</sup> ED Ex. Hooper-1 (Hooper Direct) at 8.

<sup>83</sup> ED Ex. Hooper-1 (Hooper Direct) at 8-10.

holds water rights, which authorize it to divert roughly 240,000 acre-feet of water per year from the Brazos River for use at the Freeport facility, with priority dates ranging from 1929 to 1976.<sup>84</sup> Dow's waters are the last major right on the Brazos River before it flows into the Gulf of Mexico.<sup>85</sup> Because of its location, Dow contends that it is uniquely vulnerable, especially during low flow periods, to over-appropriations by junior diverters on the river.<sup>86</sup>

Dow contends that, in recent years, there have been repeated instances when there has been insufficient water in the river to fully satisfy its permit rights. In response, the company made priority calls to the TCEQ in 2009, 2011, 2012, and 2013.<sup>87</sup>

Dow's 2009 priority call was made on June 19, 2009, at a time when the river was flowing at a rate of roughly 50 cfs at a nearby gage.<sup>88</sup> Dow made the priority call because it was concerned that the level of flow was low enough that it was becoming difficult for the company to continue to pump from the river.<sup>89</sup> More than 40 days after the priority call was made, the TCEQ suspended water rights junior to 1980 below certain BRA reservoirs.<sup>90</sup>

Dow made a second priority call on April 18, 2011, at a time when the river was flowing at a rate that was insufficient to enable the company to divert enough water from the river to meet its needs.<sup>91</sup> The Staff took 41 days to respond to the 2011 priority call.<sup>92</sup> In response, the TCEQ again suspended rights junior to 1980 below certain BRA reservoirs. When that proved to be inadequate, the TCEQ repeatedly expanded the scope of the call, ultimately suspending all rights junior to August 8, 1960, except municipal and power generation uses, and enlarging the

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<sup>84</sup> Dow Ex. 100 (Leathers Direct) at 3-5; Dow Ex. 101; Tr. at 20-21.

<sup>85</sup> Dow Ex. 100 (Leathers Direct) at 6.

<sup>86</sup> Dow Ex. 100 (Leathers Direct) at 6.

<sup>87</sup> Dow Ex. 100 (Leathers Direct) at 8.

<sup>88</sup> Dow Ex. 103 at 1.

<sup>89</sup> Tr. at 25-26.

<sup>90</sup> ED Ex. Alexander-1 (Alexander Direct) at 11; GCWA Ex. 100 (Langford Direct) at 3-7.

<sup>91</sup> Dow Ex. 103 at 2.

<sup>92</sup> Tr. at 774.

area subject to the priority call to include all water rights in the Basin below Possum Kingdom Lake.<sup>93</sup>

Dow made a third priority call on November 14, 2012.<sup>94</sup> In response, the TCEQ suspended all water rights in the Basin below Possum Kingdom Reservoir, other than municipal and power generation rights, junior to 1942.<sup>95</sup>

Dow made a fourth priority call on June 26, 2013.<sup>96</sup> In response, the TCEQ suspended all water rights in the Basin below Possum Kingdom Lake, including municipal and power generation rights, junior to February 19, 1942.<sup>97</sup>

Dow contends that, in spite of the TCEQ's response to each of its four priority calls, it never observed additional water in the River at the location of its diversion pumps. That is, none of the priority calls resulted in increased water availability for Dow.<sup>98</sup> Since January 1, 2009, Dow has, on multiple occasions, purchased so-called "interruptible" water pursuant to contracts with BRA. The company has paid BRA more than \$9 million for this interruptible water.<sup>99</sup>

GCWA is a conservation and reclamation district that distributes water in Galveston, Brazoria, and Fort Bend Counties and also holds very senior water rights. It supplies water to more than 250,000 recipients for municipal, industrial, and agricultural uses. The Brazos River is GCWA's primary source of water. GCWA has Brazos River water rights totaling roughly 380,000 acre-feet, with priority dates ranging from 1926 to 1983.<sup>100</sup> Ivan Langford, GCWA's General Manager, testified that, as an "insurance policy" to protect it during times when river

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<sup>93</sup> ED Ex. Alexander-1 (Alexander Direct) at 11; BRA Ex. 1 (Brunett Direct) at 16.

<sup>94</sup> Dow Ex. 103 at 4-6.

<sup>95</sup> ED Ex. Alexander-1 (Alexander Direct) at 12.

<sup>96</sup> Dow Ex. 103 at 7-9.

<sup>97</sup> ED Ex. Alexander-1 (Alexander Direct) at 13.

<sup>98</sup> Tr. at 46-47.

<sup>99</sup> Dow Ex. 100 (Leathers Direct) at 9; Dow Ex. 104.

<sup>100</sup> GCWA Ex. 100 (Langford Direct) at 3-7; GCWA Ex. 102.



flows are insufficient to meet all of its needs, GCWA has entered into a long-term contract for roughly 48,000 acre-feet of stored water from BRA, at an annual cost of roughly \$3.9 million. In 2009, 2011, and 2013, river flows were inadequate, thereby forcing GCWA to rely on its contracted water from BRA.<sup>101</sup> According to Mr. Langford, these recent years of drought have strained GCWA's ability to reliably serve its customers, making it increasingly necessary to ensure that all of GCWA's senior water rights are honored at all times consistent with the prior appropriation doctrine.<sup>102</sup>

According to Mr. Langford, GCWA was adversely affected by low flows in 2009. In that year, in addition to the water from the long-term contract with BRA, GCWA was forced to purchase another 24,000 acre-feet of interruptible water from BRA, at a cost of \$942,000.<sup>103</sup>

The year 2011 was extremely dry, much drier than 2009. In that year, GCWA was again adversely affected by low flows. In addition to the water from its long-term contract with BRA, GCWA again purchased another 91,486 acre-feet of interruptible water from BRA, at a cost of \$4.8 million.<sup>104</sup>

In mid-June 2013, flows in the Brazos River fell below 100 cfs in the areas around GCWA's intake pumps, making it difficult for GCWA to divert as authorized. In response, GCWA: (1) directed BRA to release stored contract water; (2) implemented Stage 2 of its drought contingency plan; and (3) submitted a priority call to the TCEQ on June 20, 2013.<sup>105</sup>

It is clear from his testimony that Mr. Langford was unimpressed by the manner and speed with which Regular Staff responded to the priority call. He explained that the agency asked GCWA to set a date for the priority call. Mr. Langford felt this was inappropriate because

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<sup>101</sup> GCWA Ex. 100 (Langford Direct) at 6-8.

<sup>102</sup> GCWA Ex. 100 (Langford Direct) at 9-10.

<sup>103</sup> GCWA Ex. 100 (Langford Direct) at 10; Tr. at 56.

<sup>104</sup> GCWA Ex. 100 (Langford Direct) at 11; Tr. at 57.

<sup>105</sup> GCWA Ex. 100 (Langford Direct) at 14-15; GCWA Ex. 103.

Regular Staff, not GCWA, is supposed to have the tools, resources, and knowledge to manage the water resources and select a curtailment date that would generate sufficient flows to meet GCWA's needs. GCWA's desire was to ensure that a sufficient amount of water was available to meet its needs, while minimizing negative impacts upon other, junior water right holders. So, GCWA selected what it believed was a conservative priority curtailment date of 1955. Five days later, Regular Staff advised GCWA that a 1955 date would not generate sufficient additional river flows to meet GCWA's needs.<sup>106</sup> In the meantime, no priority call had been issued and GCWA had been forced to rely heavily on contract water released by BRA and was able to divert only minimal amounts of water pursuant to its senior water rights.<sup>107</sup> GCWA then asked for a priority curtailment date of 1950. On the same day, Dow asked for a priority curtailment date of 1942. The ED issued a curtailment order with a 1942 cutoff on July 2, 2013, thereby superseding and mooted GCWA's priority call.<sup>108</sup>

For this case, Dow's expert witness, Dr. Brandes, performed several analyses which he contends demonstrate the threats faced by Dow's and GCWA's senior water rights in the Basin. First, he compared WAM model runs using the prior appropriation doctrine with model runs using a "natural priority doctrine." A natural priority means that holders of water rights in the Basin are able to divert and impound streamflows in geographic order from upstream to downstream, regardless of the effect on other right holders. Dr. Brandes opined that natural priority is "essentially the default priority system that governs how streamflows are apportioned among water rights in basins that do not have a watermaster," because each water right holder diverts as much as it is able without regard to the other right holders.<sup>109</sup> He testified that, absent a watermaster and absent a priority call order in effect, water right holders pay no attention to their priority dates or the rules regarding prior appropriation.<sup>110</sup>

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<sup>106</sup> In TCEQ parlance, a priority call with a 1955 date would have been a "futile" call.

<sup>107</sup> GCWA Ex. 100 (Langford Direct) at 15-16; Tr. at 59, 109-13.

<sup>108</sup> GCWA Ex. 100 (Langford Direct) at 15-16; GCWA Ex. 104.

<sup>109</sup> Dow Ex. 200 (Brandes Direct) at 30.

<sup>110</sup> Tr. at 348.

Dr. Brandes' analysis demonstrates that Dow and GCWA would not be able to fully and reliably use their more senior water rights under the natural priority doctrine as under the prior appropriation doctrine.<sup>111</sup> Because he believes natural priority better reflects the actual practice in the Basin than does the prior appropriation doctrine, Dr. Brandes concluded that this analysis proves that Dow and GCWA's rights are threatened because they are able to divert less water during drier years than authorized by their senior rights.<sup>112</sup>

Dr. Brandes also conducted a similar analysis using junior rights. He contends this analysis indicates that junior rights are diverting more water than they are entitled to under prior appropriation in drier years. For example, he compared prior appropriation with natural priority model runs for a 1964 water right between Possum Kingdom Lake and Lake Granbury and concluded that the right was 97% reliable under natural priority, but only 41.2% reliable under prior appropriation. Dr. Brandes also conducted similar analyses using water rights located in the Upper Basin, to demonstrate how dramatically a far upstream location can benefit a water right under natural priority. For example, a water right with a 1981 priority located in the extreme western reaches of the Basin had 77.7% reliability under natural priority, but only 54.7% reliability under prior appropriation.<sup>113</sup> From these analyses, Dr. Brandes concluded that, under the status quo (in which the prior appropriation doctrine is not fully enforced), senior water right holders in the Basin have less access to the water to which they are legally entitled and junior holders have more access to their rights.<sup>114</sup>

Dr. Brandes also analyzed daily inflow and outflow data from six reservoirs in the Basin during the time periods when the priority calls in 2009, 2011, and 2012 were in effect. He concluded that all of the reservoirs retained inflows that probably should have been passed through to comply with the priority calls. For example, according to Dr. Brandes, during the 2011 priority call the reservoirs collectively impounded almost 98,000 acre-feet of inflows,

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<sup>111</sup> Dow Exs. 205, 206

<sup>112</sup> Dow Ex. 200 (Brandes Direct) at 30-32.

<sup>113</sup> Dow Exs. 207, 208.

<sup>114</sup> Dow Ex. 200 (Brandes Direct) at 35; Tr. at 361.

rather than letting them flow downstream.<sup>115</sup> He further noted that the 2011 priority call had a priority date in 1960, and all the reservoirs he examined have a priority date junior to 1960, which suggests that “even under the TCEQ call order that was in effect during this time, these reservoirs were impounding streamflows that they should not have been if the prior appropriation doctrine had been fully enforced.”<sup>116</sup> Based upon this, Dr. Brandes concludes that senior water rights in the Basin were threatened even when a TCEQ priority call order was in effect.<sup>117</sup>

Finally, Dr. Brandes identified a number of specific, junior, irrigation water rights located upstream from Dow and GCWA that, based upon their own water use reports filed with the TCEQ, appear to have continued to divert water even though obligated to stop pursuant to the 2009 and 2011 priority calls. William Gavranovic, Jr. (a member of the BFFR protestant group) is one such irrigator identified by Dr. Brandes.<sup>118</sup> Dr. Brandes testified that this constituted not only additional evidence that senior water rights in the Basin are threatened by out-of-priority junior diverters, but it also demonstrated “how difficult it is for the TCEQ to fully implement and effectively enforce diversion suspension during a priority call.”<sup>119</sup>

Testimony from GCWA’s expert witness, Jordan Furnans, Ph.D., P.E., P.G., was largely consistent with Dr. Brandes’. Dr. Furnans agreed that, in the absence of a watermaster or a priority call order, the TCEQ takes a “completely ‘hands-off’ approach” to managing water rights in the Basin.<sup>120</sup> The practical result is that the natural priority system controls in the Basin.<sup>121</sup> He opined that, on any given day, there may be “innumerable” instances of junior

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<sup>115</sup> Dow Ex. 200 (Brandes Direct) at 36-38; Dow Exs. 209, 210.

<sup>116</sup> Dow Ex. 200 (Brandes Direct) at 39.

<sup>117</sup> Dow Ex. 200 (Brandes Direct) at 40.

<sup>118</sup> Dow Ex. 200 (Brandes Direct) at 40-41.

<sup>119</sup> Dow Ex. 200 (Brandes Direct) at 41.

<sup>120</sup> GCWA Ex. 200 (Furnans Direct) at 11.

<sup>121</sup> GCWA Ex. 200 (Furnans Direct) at 12.

water right holders taking water out of turn when there is a senior water right in the Basin with needs not fully satisfied.<sup>122</sup>

Dr. Furnans testified that for the entirety of July and August 2009, GCWA was diverting water it purchased under contract with BRA because run-of-the-river water (meaning water that had never been stored in and released from a reservoir) was not available to it.<sup>123</sup> Dr. Furnans reviewed the annual water use reports that are self-reported by water right holders to the TCEQ.<sup>124</sup> Using this data, he identified 94 water right holders junior to GCWA that made run-of-the-river diversions when GCWA was in need of the water, including West Central Texas Municipal Water District, Bradley Ware, and Sidney Kacir.<sup>125</sup> He opined that these diversions were in contravention of the prior appropriation doctrine and, therefore, illegal.<sup>126</sup> He did similar analyses for 2011, finding that 79 junior diverters, including West Central Texas Municipal Water District, Bradley Ware, William Gavranovic, and the City of Lubbock, diverted run-of-the-river water in June, August, September, and/or November 2011, at a time when GCWA had a demonstrated, but unmet, need for the water.<sup>127</sup> According to Dr. Furnans, GCWA was unable to use its 1926 water right in 2011.<sup>128</sup>

During the 2013 priority call, GCWA conducted helicopter surveillance along the Brazos River and took pictures of apparent diversions being made in violation of the priority call. Dr. Furnans reviewed the photographs and identified at least three pumps that were actively withdrawing water despite being associated with a water right junior to the call date. For

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<sup>122</sup> GCWA Ex. 200 (Furnans Direct) at 20.

<sup>123</sup> GCWA Ex. 200 (Furnans Direct) at 22

<sup>124</sup> Dr. Furnans discussed a number of deficiencies with the TCEQ's annual water use reports. He noted that there is only a roughly 60% compliance rate with the requirement to file these reports. In other words, 40% of water rights holders in the Basin provide no water use data to the TCEQ. Moreover, the reports are filed only once per year, leading to stale data. Many of the water right holders do not have meters on their pumps, so the numbers they report are only rough estimates that are impossible to confirm or disprove. Finally, TCEQ does nothing to verify the reported usage quantities. GCWA Ex. 200 (Furnans Direct) at 21.

<sup>125</sup> GCWA Ex. 200 (Furnans Direct) at 21-25; GCWA Ex. 203.

<sup>126</sup> Tr. at 209-210.

<sup>127</sup> GCWA Ex. 200 (Furnans Direct) at 25-26; GCWA Ex. 205.

<sup>128</sup> Tr. at 227.

example, one photograph shows diversions by a pump for a gravel mining operation with a priority date in 1997. Another shows diversions by a pump for an agricultural operation with a priority date in 1982.<sup>129</sup>

From these investigations, Dr. Furnans concludes that senior rights in the Basin are threatened. He also views the fact that there have been four priority calls made in the Basin in the last five years to be additional evidence of the threat.<sup>130</sup>

Janes Gravel is a sand and gravel mining company located in the Upper Basin of the Brazos River, near Lubbock, Texas. The company's vice president, Ralph "Jason" Janes IV, explained that the company is one of the senior water right holders on the North Fork of the Double Mountain Fork of the Brazos River. Its water right authorizes diversion of 450 acre-feet, with a priority date of April 17, 1968.<sup>131</sup>

Mr. Janes testified that, more often than not, Janes Gravel is unable to divert its full, authorized amount of water from the Basin.<sup>132</sup> Mr. Gravel asserted that his company's water right is threatened. He explained that circumstances have existed in the past, and continue to exist, whereby senior water right holders, such as his company, may be unable to fully exercise their water rights due to the actions of junior water right holders. For example, the City of Lubbock, Texas has two water rights to impound Basin water in a series of small impoundments known as the "Jim Bertram Lake System." Those water rights' 1972 and 1974 priority dates are junior to Janes Gravel's 1968 priority date. Further, Lubbock's water rights authorize only the impoundment of water for recreational uses, and do not authorize the diversion of the water.<sup>133</sup> Mr. Janes expressed concern that those lakes may be impounding water without any regard to

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<sup>129</sup> GCWA Ex. 200 (Furnans Direct) at 26-29; GCWA Exs. 300-309.

<sup>130</sup> Tr. at 269.

<sup>131</sup> Janes Gravel Ex. 100 at 4-9, and at Attachment 1.

<sup>132</sup> Janes Gravel Ex. 100 at 9.

<sup>133</sup> Janes Gravel Ex. 100 at Attachment 4.

priority or consideration of the needs of downstream senior water right holders.<sup>134</sup> He conceded, however, that he did not have any evidence to prove that Lubbock was failing to appropriately pass water downstream from the Bertram lake system.<sup>135</sup> Mr. Janes further testified that his company has experienced a number of shortages of water in the North Fork in recent years.<sup>136</sup> Mr. Janes testified that the company's water right has always been precarious due to the scant and unreliable rainfall in the area, such that he has considered the company's water right to have been threatened every year since he began working for the company in 1997.<sup>137</sup>

The ED disputes the contention that the TCEQ does not enforce prior appropriation outside of watermaster areas. According to Kathy A. Alexander, Ph.D., the ED's expert witness on water availability, the agency has in recent years taken steps to increase its responsiveness to potential water availability issues.<sup>138</sup> It is Dr. Alexander's opinion, however, that senior water rights in the Brazos Basin were threatened in 2009, 2011, 2012, and 2013.<sup>139</sup> She believes that the existence of the priority calls in those years constitutes the "strongest proof that a threat exists to senior water rights in times of shortage."<sup>140</sup>

The Protestants dispute the notion that senior rights are threatened in the Basin. Scott Hibbs, the expert witness for the Upper Brazos Coalition, testified that senior rights in the Upper Basin are not threatened. He acknowledged that there are a number of water rights in the Upper Basin, including rights held by Coalition members, that have chronically gone unsatisfied. For example, White River Lake is currently at only 0.9% of its authorized storage capacity, and Hubbard Creek Lake is only 30% full, which is a record low. Indeed, Mr. Hibbs concedes that

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<sup>134</sup> Janes Gravel Ex. 100 at 12-13, and at Attachment 7.

<sup>135</sup> Tr. at 141-42.

<sup>136</sup> Janes Gravel Ex. 100 at 14-15.

<sup>137</sup> Tr. at 138-39.

<sup>138</sup> ED Ex. Alexander-1 (Alexander Direct) at 14-15.

<sup>139</sup> ED Ex. Alexander-1 (Alexander Direct) at 18.

<sup>140</sup> ED Ex. Alexander-1 (Alexander Direct) at 20.

the “reliability of Upper Basin rights are such that the authorized diversions are rarely going to be fully satisfied.”<sup>141</sup>

At least two water right holders in the Upper Basin have made priority calls to the TCEQ. In 2011, the TCEQ received priority calls from two holders of water rights for domestic and livestock use who were located above the Possum Kingdom Reservoir. One was located on the Clear Fork of the Brazos River and the other was on the North Fork/Double Mountain Fork of the Brazos River. Regular Staff determined that both were “futile calls,” meaning that suspending junior rights would not have resulted in additional water flowing to the makers of the calls. Accordingly, the ED decided not to suspend any water rights in response to those two calls.<sup>142</sup>

Mr. Hibbs testified that none of the priority call orders issued by the ED has ever required the suspension of diversions in the Upper Basin.<sup>143</sup> Mr. Hibbs is aware of seven complaints filed with the TCEQ complaining of diversions by Upper Basin water right holders since 2002. Of those seven, three concluded with a finding of no violation, three resulted in the ED issuing notices of violations (NOVs), and one was resolved by the TCEQ enforcement team.<sup>144</sup>

Based upon this evidence, Mr. Hibbs concludes that water rights in the Upper Basin are “stressed,” but not threatened. He does not believe there is evidence showing a “systemic disregard of the law by diverters in the Upper Basin.”<sup>145</sup> Mr. Hibbs discussed a scenario in which a junior water right holder is making diversions and, as a direct result, is causing a senior water right holder to be unable to meet his needs. According to Mr. Hibbs, the junior water right holder’s actions do not violate the terms of his water right and are not contrary to the prior

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<sup>141</sup> UBC Ex. 4 (Hibbs Direct) at 25-26; UBC Ex. 12.

<sup>142</sup> ED Ex. Alexander-1 (Alexander Direct) at 14.

<sup>143</sup> UBC Ex. 4 (Hibbs Direct) at 31.

<sup>144</sup> UBC Ex. 4 (Hibbs Direct) at 31-32.

<sup>145</sup> UBC Ex. 4 (Hibbs Direct) at 33.



appropriation doctrine, so long as the senior water right has not filed a complaint or a made a priority call to the TCEQ.<sup>146</sup>

William Gavranovic, Jr. (a member of the BFFR protestant group) and his son own two water rights authorizing diversions of 2,460 and 4,300 acre-feet, respectively, for their commercial turf grass operation. Both of the rights are term permits, one with an expiration date in 2008, the other with an expiration date in 2012. Both permits are still in force because the Gavranovics have renewal applications pending before the TCEQ.<sup>147</sup> Mr. Gavronovic is opposed to appointment of a watermaster because it would not benefit his operation or the operations of his neighbors.<sup>148</sup>

Bradley Ware (another member of the BFFR protestant group) owns a water right authorizing diversion of 100 acre-feet for irrigation.<sup>149</sup> Mr. Ware is opposed to appointment of a watermaster because he fears it will negatively impact agricultural water right holders.<sup>150</sup>

**c. ALJs' Analysis**

By almost any measure, the Aligned Parties have proved that senior water rights in the Basin are threatened. As discussed in the prior section, it is not necessary to go so far as to prove actual harm has been suffered by senior water rights in order to prove that a threat exists. However, there is ample proof that actual harm has been suffered, and will continue to be suffered, by a number of senior water rights.

Dow has been forced to make four priority calls within the last five years. Those calls constitute concrete evidence of actual harm resulting from a set of circumstances that threaten

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<sup>146</sup> Tr. at 567-68.

<sup>147</sup> BFFR Ex. 1 (Gavronovic Direct) at 1-2.

<sup>148</sup> BFFR Ex. 1 (Gavronovic Direct) at 3.

<sup>149</sup> BFFR Ex. 2 (Ware Direct) at 1.

<sup>150</sup> BFFR Ex. 2 (Ware Direct) at 2.

senior water rights. None of those calls were deemed by the ED to have been futile, frivolous, or unnecessary. In each case, a priority order was issued by the TCEQ. In each of those four years, Dow experienced river conditions that made it difficult or impossible to utilize its senior water rights. Since 2009, Dow has decided to purchase interruptible contract water from BRA, at the cost of millions of dollars, in part because it could not fully rely upon its own rights.

GCWA experienced similar low flow conditions in 2009, 2011, and 2013 making it difficult or impossible to fully utilize its senior rights. It has likewise been forced to pay millions of dollars to purchase interruptible water from BRA, in part because it has been unable to fully rely upon its senior rights. GCWA made its own priority call to the TCEQ in 2013.

The various analyses conducted by Dr. Brandes convincingly demonstrate that, under the status quo, senior water rights are much more vulnerable than they would be if the prior appropriation doctrine were being consistently enforced. Currently in the Basin, senior water right holders have less access to the water to which they are legally entitled and junior water rights holders and those who are located far upstream have more. As shown by Drs. Brandes and Furnans, a number of junior water right holders have in the past, and will in the future if no watermaster is appointed, likely divert water out-of-priority, to the detriment of senior water right holders.<sup>151</sup>

The ED's own witness, Dr. Alexander, agrees that senior water rights are threatened in the Basin. Ironically, the evidence presented by the Upper Brazos Coalition supports, rather than refutes, the notion that senior water rights in the Upper Basin are threatened. Mr. Hibbs described water rights in the Upper Basin as being "stressed," and admitted that they chronically go unsatisfied. All of those rights are, to lesser or greater degrees, senior to other rights. He described a number of reservoirs in the Upper Basin that are 1% full or less. He identified two priority calls and at least four legitimate complaints made by water right holders in the Upper

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<sup>151</sup> The ALJs are sympathetic to the fact that, due to the paucity of data available outside of watermaster areas, these junior water right holders have no way of knowing that they are violating the terms of their permits and violating the law (i.e. the prior appropriation doctrine). The ALJs reject, however, Mr. Hibbs' contention that, in the absence of a priority call or complaint, junior water right holders have no obligation to comply with prior appropriation doctrine.

Basin. Mr. Hibbs stressed that there is not evidence of “systematic disregard of the law by diverters in the Upper Basin.” But that is not what is needed in order to prove a threat.

Simply put, the evidence amply proves that there is a set of circumstances existing in both the Upper Basin and Lower Basin that creates the possibility that senior water right holders may be unable to fully exercise their rights. Among other things, in times of water shortage, the rights of senior water right holders throughout the entirety of the Basin are threatened by the situation of less available water than appropriated water rights. They are also threatened by the disregard of the prior appropriation doctrine by junior water right holders, and by the storage, diversion, and use of water in excess of the quantities to which other holders of water rights are lawfully entitled. For these reasons, the ALJs conclude that the rights of senior water right holders in the Basin are threatened.

## **B. Need**

### **1. A Watermaster is Needed in the Basin if One is Desirable or Useful**

The second issue that must be determined is whether “a need exists for appointment of a watermaster” in the Basin.<sup>152</sup> As with “threatened,” the word “need” is not defined by the Texas Water Code. The Aligned Parties contend that, based upon the plain wording of the statute, the issue of need is bound up with the issue of threat, such that if a threat is proven, then need is likewise proven. Stated differently, the Aligned parties argue that a watermaster is needed if a threat exists to senior water rights.<sup>153</sup> Accordingly, they contend that issues of administrative efficiency and cost are irrelevant to this proceeding.<sup>154</sup> The Aligned Parties also rely upon the Commission’s final order from the Concho River case, in which the Commission declared: “if senior rights are threatened, then a need exists for a watermaster.”<sup>155</sup>

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<sup>152</sup> Tex. Water Code §§ 11.451, 11.452.

<sup>153</sup> Aligned Parties Closing Br. at 27.

<sup>154</sup> Aligned Parties Closing Br. at 27.

<sup>155</sup> Order Appointing a Watermaster for the Concho River Segment at 7, TCEQ Docket No. 2000-0344-WR; SOAH Docket No. 582-02-2130, TCEQ (August 17, 2004)(the Concho Final Order).

All the other parties disagree with the Aligned Parties on this point. The ED points out a logical inconsistency contained within the Proposal for Decision in the Concho River case. On the one hand, the presiding ALJ in that case concluded that, because threat equals need, the issue of costs are irrelevant and, having found a threat, no further analysis was required. On the other hand, the ALJ then proceeded to engage in a lengthy discussion of the costs and benefits of appointing a watermaster. Thus, the ED questions whether the Concho River order really stands for the proposition that need is entirely subsumed within threat.<sup>156</sup>

The ED argues that the test for determining need should consist of a cost/benefit analysis. Under the ED's test, if the benefits of appointing a watermaster outweigh the costs and detriments, then there is a "need" for a watermaster.<sup>157</sup>

Along the same lines, the BFFR Group provides a number of reasons why the Legislature chose to require a finding of not only a threat, but also a need:

Perhaps, the Commission could find that senior water rights are "threatened" but that the threat is of such a *kind* that a watermaster would *not* help to ameliorate the threat. Perhaps, the Commission could find that senior water rights are "threatened" but also find that a watermaster program would cost too much for that basin (for the agency or the regulated), or be too intrusive, or would otherwise not be right for the perceived 'threat.'<sup>158</sup>

The BFFR Group advocates a three-part test for determining need:

- 1) What can a Watermaster *actually* provide that the existing system cannot provide?
- 2) Can a Watermaster function in the Brazos River Basin, at all, given the existing known and unknown variables unique to the Brazos River Basin?
- 3) Is [sic] the additional costs of a Watermaster worth the imposition of an additional layer of government?<sup>159</sup>

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<sup>156</sup> ED Closing Br. at 7-9.

<sup>157</sup> ED Closing Br. at 9.

<sup>158</sup> BFFR Reply Br. at 7 (emphasis in original).

<sup>159</sup> BFFR Closing Br. at 10 (emphasis in original).

The Bell County Group points out that, under the rules of statutory construction, every word of a statute must be presumed to have been used for a purpose. The Legislature could have used only one word, “threat,” if it had wanted to do so. Because the Legislature chose to use two words, “threat” and “need,” it should be presumed that the words have different meanings.<sup>160</sup>

The Upper Brazos Coalition argues that an assessment of “need” must ask “whether the existence of a watermaster would have made any meaningful difference to the outcome of water management during times of water shortages.”<sup>161</sup>

Prior to the hearing on the merits, the Aligned Parties filed a motion for partial summary disposition. Citing the Concho River Final Order, they argued that a showing of threat to senior water rights proved there was a need for a watermaster, and no other evidence was necessary or relevant to prove the need. The ED and several other parties opposed the motion. The ED cautioned that the Concho Final Order was based on the particular facts shown in that case concerning another basin and noted that the Commission might wish to refine its interpretation of need based on the particular facts of this case. The ALJs agreed with the ED and denied the motion, reasoning that the better approach in this case was to conduct a broad inquiry into the particular facts concerning the Brazos River Basin and the need for a watermaster there.<sup>162</sup>

Texas Water Code §§ 11.451 and 11.452 variously and repeatedly state that, in order to appoint a watermaster, the Commission must find that senior rights are “threatened” and a “need” for the appointment exists. Pursuant to the rules of statutory construction, words in statutes are generally to be construed according to their common usage.<sup>163</sup> According to their common definitions, a threat is not the same thing as a need. “Need” is commonly defined as “a lack of something requisite, desirable, or useful,”<sup>164</sup> while a “threat” is “an indication of

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<sup>160</sup> Bell County Closing Br. at 30.

<sup>161</sup> UBC Reply Br. at 9.

<sup>162</sup> Order No. 8.

<sup>163</sup> Tex. Gov’t Code § 311.011.

<sup>164</sup> Webster’s Ninth New Collegiate Dictionary at 790 (1988).

something impending.”<sup>165</sup> Accordingly, the ALJs conclude that if the evidence shows that appointment of a watermaster in the Basin would be desirable or useful for the proper management of water rights in the Basin, then a watermaster is “needed” in the Basin.

## **2. There is a Need for a Watermaster in the Basin**

### **a. Evidence Presented**

The Aligned Parties and the ED agree that there is a need for a watermaster in the Basin. They presented substantial evidence to support this assertion. The ED admits that watermasters are able to respond more quickly and capably to water shortages and illegal diversions than can Regular Staff in those areas where no watermaster program exists. This is due to a number of factors. According to ED witness Hooper, unlike Regular Staff, watermasters have access to real-time data regarding streamflows, water usages, and so on. Unlike Regular Staff, watermasters have up-to-date information on what water is being diverted pursuant to what water rights at any given moment, thus enabling them to better anticipate shortages before they reach a crisis point and work with water users to develop a strategy that will best meet all users’ needs.<sup>166</sup>

By statute, each water right holder is required to submit an annual water use report to the TCEQ.<sup>167</sup> These reports are submitted annually in March following the year when the diversions were used. The reports constitute nearly the only data about actual water usage that the TCEQ has to rely upon when it receives a priority call.<sup>168</sup> Outside of watermaster areas, water right holders do not file a DOI and, except in rare exceptions, they are not required to have meters.<sup>169</sup>

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<sup>165</sup> Webster’s Ninth New Collegiate Dictionary at 1128-29.

<sup>166</sup> ED Ex. Hooper-1 (Hooper Direct) at 10.

<sup>167</sup> Tex. Water Code § 11.031(b).

<sup>168</sup> As discussed above in this PFD, there are a number of deficiencies with these annual use reports, such as roughly 40% of water right holders never file their reports in the first place. Moreover, Ms. Alexander acknowledges that it is difficult to evaluate the accuracy of the water use reports. Tr. at 614.

<sup>169</sup> Tr. at 614-15.

Therefore, the agency does not consistently know when, how, and how much water each water right holder is using.<sup>170</sup> Outside of watermaster areas, Regular Staff does not monitor water usage or streamflows on an ongoing basis (except perhaps in the event of a priority call).<sup>171</sup>

The TCEQ Guidance Document identifies a number of advantages to having a watermaster regulate water usage:

- The watermaster can lock up pumps for violations and allocate flows among priority users during water shortages.
- The watermaster continuously monitors streamflows, reservoir levels, and water use in the river basin.
- The watermaster can coordinate diversions, to ensure that all users get the best overall value from the available water, while still protecting senior rights.
- Rather than only reacting after a shortage prompts a priority call, a watermaster can anticipate a shortage before it reaches a crisis, and develop a strategy for proactively dealing with the anticipated shortage.
- A watermaster's real-time data enables a watermaster to quickly identify and stop illegal diversions.
- A watermaster is often able to serve as an intermediary between water rights holders, thereby avoiding costly litigation.
- Watermasters provide valuable technical assistance to water users.<sup>172</sup>

According to the TCEQ Guidance Document, the only disadvantages of a watermaster program are the costs of administration and meters. The document, however, describes these costs as being "rather reasonable."<sup>173</sup>

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<sup>170</sup> Tr. at 783.

<sup>171</sup> Tr. at 783.

<sup>172</sup> GCWA Ex. 202 at 15-17.

<sup>173</sup> GCWA Ex. 202 at 17-18.

Dr. Alexander specifically identified no less than 17 ways in which a watermaster is superior to Regular Staff oversight of water rights:

1. Real time data on diversions, not otherwise available to Regular Staff, and real time directives to junior water rights;
2. Actual diversion data, not otherwise available to Regular Staff;
3. Measured diversions;
4. More frequent field investigations;
5. Dedicated full time TCEQ employees;
6. More people on the River;
7. Potentially better estimation of domestic & livestock withdrawals;
8. More active role in day-to-day management of water rights;
9. Anticipate a shortage before it reaches a crisis point;
10. More information about smaller reservoirs;
11. More efficiently address timing of diversions thereby reducing the likelihood of waste;
12. More responsive and quicker to respond to changing stream flow conditions;
13. Ability to cut off control works;
14. Enforce non-interference with released water purchased from storage;
15. More aware of drought conditions as they develop;
16. [Would not] wait for a priority call to act; and
17. Potentially reduce workload to TCEQ water and [Office of Compliance and Enforcement] staff so they are free to return to normal duties.<sup>174</sup>

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<sup>174</sup> AP Ex. 4 (record citations deleted); Tr. at 668-69.



Ms. Alexander explained that, since 2009, Regular Staff has substantially improved the methods for handling priority calls, but continues to react to water allocation problems rather than anticipating them.<sup>175</sup>

The witnesses for the Aligned Parties agreed that a watermaster has access to substantially more meaningful data, and would be proactive in managing water rights, while Regular Staff is purely reactive.<sup>176</sup> Testimony from Dow's expert witness, Dr. Brandes, largely corroborated the testimony from the ED's witnesses. He stressed that, unlike Regular Staff, a watermaster has monitoring programs in place to have real-time information regarding the location and activities of each water right, the immediate needs of diverters, current streamflow and reservoir conditions, and so on. Watermasters review DOIs and then issue directives to water right holders telling them how much and at what rate diversions can be made. Then, following the diversions, the water right holder must file a use report identifying the actual volume of water that was diverted. As a result, the watermaster has a detailed, up-to-date database which he can use to regulate usage.<sup>177</sup> According to Dr. Brandes, a watermaster can make decisions about how to apportion available water among water rights within a few hours,<sup>178</sup> whereas Regular Staff might take 10 days or more.<sup>179</sup>

Both Dow and GCWA have experienced frustration and confusion in their dealings with Regular Staff regarding their priority calls. It took the TCEQ more than forty days to act in response to Dow's 2009 priority call. In 2011, it took 41 days and multiple iterations of a priority call order before the TCEQ arrived at a formula that the agency believed was adequate to result in additional water availability for senior water right holders. Although the TCEQ's ability to respond to a priority call appears to have improved over time, there was still confusion and delay associated with the 2013 calls made by Dow and GCWA. The agency appears to put

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<sup>175</sup> Tr. at 642, 718-19.

<sup>176</sup> Tr. at 61-64 (Leathers), GCWA Ex. 100 (Langford Direct) at 10; Janes Gravel Ex. 1 (Janes Direct) at 17-18.

<sup>177</sup> Dow Ex. 200 (Brandes Direct) at 18-19.

<sup>178</sup> Dow Ex. 200 (Brandes Direct) at 19.

<sup>179</sup> Dow Ex. 200 (Brandes Direct) at 21.

the onus upon the entity making the call to determine an appropriate priority cut-off date, even though all parties agree that no water right holder can possibly have the information needed to make such a decision. GCWA made its priority call on June 20, 2013, but no priority order was issued by the TCEQ until July 2, twelve days later. This despite the fact that time is plainly of the essence in times of water shortage.

Dr. Brandes testified that the approach used by the ED when implementing a priority call is inferior to the approach to enforcing the prior appropriation doctrine used by a watermaster. To implement a priority call, Regular Staff adopts a specific call date, such as January 1, 1960. Then, water rights senior to that date can continue diversions unaffected, while those junior to it must stop. Dr. Brandes see this approach as cruder and less nuanced than the approach that can be taken by a watermaster. Instead of an across-the-board priority cutoff, the watermaster can assess, on an individual water right basis, which specific water rights are entitled to divert and impound (in what amounts) and which are not. This avoids, for example, imposing a cut-off on a junior right where such a curtailment would not result in additional water reaching any senior right holders.<sup>180</sup>

According to Dr. Brandes, a watermaster is better equipped and more effective in apportioning water in times of low flow, because dealing with water shortage conditions requires “intensive effort and attention in order to properly enforce the prior appropriation doctrine.”<sup>181</sup> A watermaster has a staff dedicated to doing just that, whereas the ED does not and has to divert staff members from their other, regular duties. He also stressed that the watermaster has the real-time data that is essential to assessing where and how water demands can be managed to maximize usage while still protecting senior rights.<sup>182</sup>

As additional support for the notion that a watermaster is needed, the Aligned Parties point to evidence of lax enforcement on the part of Regular Staff. The case of the water use

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<sup>180</sup> Dow Ex. 200 (Brandes Direct) at 22.

<sup>181</sup> Dow Ex. 200 (Brandes Direct) at 20.

<sup>182</sup> Dow Ex. 200 (Brandes Direct) at 20-21, 24.

reporting by the Leonard Trusts is illustrative. The Leonard Trusts own and operate Starr Hollow Reservoir located in Hood County, Texas, on a tributary to the Brazos River. The Trusts own a water right that authorizes: (1) impoundment of up to 1,454 acre-feet in Star Hollow Reservoir; and (2) diversion of up to 144 acre-feet for irrigation and recreational purposes, with a priority date of August 31, 1967.<sup>183</sup> Each water right holder is legally obligated to submit annual water use reports to the TCEQ. In compliance with this requirement, the Leonard Trusts have timely submitted annual water use reports. For the period from 2002 through 2012, however, those water use reports indicated that the Leonard Trusts diverted more than their authorized 144 acre-feet in nine years out of the eleven-year period. In other words, between 2002 and 2011, the Leonard Trusts reported to the TCEQ nine times that they used more water than authorized by their water right. On the first eight occasions, the TCEQ apparently failed to notice the overuse, because it took no action. However, on the ninth occasion, when it received the Leonard Trusts' annual water use report for 2011, the ED initiated an investigation of the overuse. Ultimately, it was determined that the Leonard Trusts were making a mathematical error in their calculations of water usage and that, in fact, the Trusts had not used more than 144 acre-feet in any of the nine years. However, according to the Aligned Parties, the TCEQ was either inattentive or indifferent to eight prior years of reported overuse of water by the Leonard Trusts.<sup>184</sup> The Aligned Parties contend that this constitutes evidence that the TCEQ is not sufficiently concerned with or focused on enforcing and managing water use in the Basin. The Aligned Parties believe that a watermaster devoted to the Basin would be more attentive and committed to managing the Basin.

According to Dr. Alexander, the TCEQ has an aspirational goal of issuing a priority call order within 10 days from the receipt of a priority call.<sup>185</sup> Dr. Brandes testified, however, that a watermaster is able to respond to shortage problems within a matter of hours.<sup>186</sup>

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<sup>183</sup> Leonard Trusts Ex. LT-002; Tr. at 399.

<sup>184</sup> AP Ex. 1; Tr. at 399-404, 409.

<sup>185</sup> Tr. at 612.

<sup>186</sup> Dow Ex. 200 (Brandes Direct) at 19.

In this proceeding, BRA takes no position on the question of need. BRA recognizes, however, that there are potential benefits for the Basin if a watermaster is appointed.<sup>187</sup> BRA's senior management has adopted an official position statement on the issue of watermaster appointment. The position statement, which was admitted in evidence, stresses BRA's neutrality while acknowledging benefits to the Basin of a prudently implemented watermaster program, as follows:

- More real-time water rights administration, accounting, and enforcement;
- Increased protection for water BRA stores and releases for [BRA's] customers;
- Fairness and transparency in surface water use throughout the basin; and
- Removal of BRA from the difficult position of being erroneously seen as the regulator/enforcement entity for the basin.<sup>188</sup>

BRA's position statement also acknowledges that appointment of a watermaster is probably "inevitable . . . given the increasing consumption of existing water rights, competing interests, and the uncertainty of future drought severity in the basin."<sup>189</sup>

Brad Brunett, BRA's Water Services Manager, also enumerated several drawbacks associated with appointment of a watermaster. The first drawback would be the financial cost of the administration of the watermaster, a large portion of which would be borne by BRA and its customers. Second, Mr. Brunett pointed out that, most of the time, a watermaster would not be needed, because in most years there is sufficient water flowing in the Basin to meet the needs of all water rights.<sup>190</sup>

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<sup>187</sup> BRA Ex. 1 (Brunett Direct) at 11-12.

<sup>188</sup> BRA Ex. 5; *see also* BRA Ex. 1 (Brunett Direct) at 13.

<sup>189</sup> BRA Ex. 5.

<sup>190</sup> BRA Ex. 1 (Brunett Direct) at 13-14.

Third, Mr. Brunett opined that a watermaster might effectively supersede BRA's operation of a "credit system." BRA has entered into contracts with five large water customers, including Dow, NRG, and GCWA. Using the contract with Dow as an example, pursuant to the credit system, BRA is allowed to impound inflows during times of higher flows when those inflows could have been used by Dow pursuant to its senior right. Then, in times of lower flows, BRA releases impounded water at Dow's request. BRA then determines how much of the released water was stored water and how much was passed through as inflows. A pass-through credit is applied to offset water use under Dow's water supply contract with BRA. Mr. Brunett views the credit system as an efficient and effective way for allocating water during low-flow periods. He acknowledged that a watermaster could incorporate or accommodate the existing credit system and, if the watermaster did so, it would make the credit process more transparent to BRA's customers, and it would have the desirable effect of having a disinterested third-party, rather than BRA, make the credit calculations.<sup>191</sup>

George Sidney Kacir owns property adjacent to the Little River, a tributary to the Brazos River. He has a water right that he uses for his commercial pecan orchard on his property. He is opposed to the appointment of a watermaster in the Basin because he believes there is no need for one.<sup>192</sup> Another opponent of a watermaster is Kacir Wheeler LLC (Kacir Wheeler). Kacir Wheeler owns a water right with a priority date of 1984. That water right authorizes the diversion of 400 acre-feet per year from the Little River for irrigation use. Like George Sidney Kacir, Kacir Wheeler opposes the appointment of a watermaster in the Basin because it believes there is no need, and it is opposed to the additional bureaucracy that a watermaster would create. The company is also concerned that the watermaster would be authoritarian in nature.<sup>193</sup>

The Leonard Trusts complain that the appointment of a watermaster would merely add a "layer of bureaucracy" that will increase costs.<sup>194</sup> Kacir Wheeler is similarly concerned about

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<sup>191</sup> BRA Ex. 1 (Brunett Direct) at 9-10, 13-14; Tr. at 422-23.

<sup>192</sup> Kacir Ex. 1 (G. Kacir Direct).

<sup>193</sup> Kacir Wheeler Ex. 1 (C. Wheeler Direct).

<sup>194</sup> Leonard Trusts Exs. LT-005 (M. Leonard Direct) at 4, and LT-001 (Maddux Direct) at 5.

the additional bureaucracy and costs that a watermaster would impose.<sup>195</sup> Mr. Gavronovic and Mr. Ware are also opposed to appointment of a watermaster because it would impose another layer of government and costs.<sup>196</sup>

The Upper Brazos Coalition acknowledges that, in the absence of a watermaster, there is little information available as to when and how much water right holders on the river are diverting.<sup>197</sup> Nevertheless, the Coalition contends there is no need for a watermaster because he or she would have no measurable impact upon the threats experienced by senior water right holders. Mr. Hibbs explained how he would analyze need, as follows:

If a call is made, and it's honored, and it doesn't work to get water to the diversion point, then we should be asking in that instance, could a watermaster have done something systemically different than TCEQ otherwise did to free up flows down to the diversion point? If a call is made, it's honored, and it does work, then we must question whether a watermaster is needed at all.<sup>198</sup>

Mr. Hibbs pointed out that the two priority calls that were made in the Upper Basin were deemed to be futile. He then argued that a watermaster could not have led to a better result with respect to the two water users who made those calls.<sup>199</sup>

Considerable evidence was introduced by Ms. Hooper, a program liaison with the TCEQ's watermaster section, regarding the administrative costs associated with a watermaster program. Outside of watermaster areas, the costs of managing water rights are paid by TCEQ using general revenues.<sup>200</sup> Ms. Hooper estimated that the TCEQ incurred expenses of \$283,328 and \$513,874 respectively in 2009 and 2011 in order to respond to the priority calls.<sup>201</sup>

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<sup>195</sup> Kacir Wheeler Ex. 1 (C. Wheeler Direct).

<sup>196</sup> BFFR Ex. 1 (Gavronovic Direct) at 3; BFFR Ex. 1 (Ware Direct) at 2.

<sup>197</sup> Tr. at 524.

<sup>198</sup> UBC Ex. 4 (Hibbs Direct) at 25.

<sup>199</sup> UBC Ex. 4 (Hibbs Direct) at 33.

<sup>200</sup> ED Ex. Hooper-1 (Hooper Direct) at 18.

<sup>201</sup> ED Ex. Hooper-1 (Hooper Direct) at 17; ED Ex. Hooper-3 at 4.

Ms. Hooper did not know the agency's costs for the year 2013. She noted that additional, but hard to quantify, costs are also incurred by the TCEQ when managing water rights outside a watermaster area. This is because members of the Regular Staff who conduct water rights investigations are not dedicated specifically to water rights, meaning they have other duties as well. For example, if a priority call is made in a non-watermaster area, the agency would be forced to take personnel and resources away from other important areas over which TCEQ has regulatory responsibility. The ED has made the determination that responding to priority calls takes precedence over other, routine agency work. Therefore, other work at the agency might suffer while staff responds to a priority call.<sup>202</sup>

Rather than being funded from TCEQ general revenue, the financial costs incurred by the watermaster in carrying out his responsibilities must be paid by the holders of the water rights that are administered by the watermaster.<sup>203</sup> According to Ms. Hooper, each water right holder in the other watermaster areas of the state is currently charged an annual "base fee" of \$50, plus a "use fee" per acre-foot of water authorized for diversion. In addition, most water right holders are required to install a meter on their pumps so that the amount of water diverted can be verified.<sup>204</sup>

Fred Blumberg is a water resources specialist who testified as an expert witness on behalf of the Aligned Parties. Mr. Blumberg undertook an investigation to attempt to estimate the annual cost of a watermaster program for the Basin. He estimated that the annual cost of a watermaster program for the entire Brazos Basin would be \$793,008, not including first-year start-up costs, such as the costs of purchasing vehicles and new computers. He arrived at this amount by assuming that a watermaster program in the Brazos Basin would be similar in approach, scope, and operation to the existing South Texas Watermaster program. He took the budget for the South Texas program and then made adjustments to it to account for differences between that program's basins and the Brazos Basin, such as number of permits, square miles,

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<sup>202</sup> ED Ex. Hooper-1 (Hooper Direct) at 17-18.

<sup>203</sup> Tex. Water Code §§ 11.329(a) and 11.455(a).

<sup>204</sup> ED Ex. Hooper-1 (Hooper Direct) at 11-12.

and so on. He then concluded that a watermaster program for the entire Brazos Basin would require 10 full-time employees (FTEs), 9 vehicles, and 3 offices. In addition, Mr. Blumberg estimated that the first-year start-up costs would be \$261,000.<sup>205</sup> Mr. Blumberg acknowledged that his cost estimate was significantly higher than a cost estimate prepared by the ED, which is discussed below.<sup>206</sup>

Mr. Blumberg then estimated the rates that would need to be charged for water usage in the Basin in order to recover the cost of the watermaster program. He concluded that, not including the base fee, municipal rates would be roughly \$0.16 per acre-foot, and irrigation rates would be roughly \$0.13 per acre-foot. Stated differently, the watermaster program would cost municipal users \$0.00000049 per gallon and irrigators 0.0000004 per gallon.<sup>207</sup> By way of comparison, the system-wide rate BRA charges to raw water customers is \$62.50/acre-foot, and its agricultural rate is \$43.75/acre-foot.<sup>208</sup>

Using an approach similar to Mr. Blumberg's, Ms. Hooper, on behalf of the ED, made an estimate of the annual cost of a watermaster program for the Basin. She estimated that the annual cost of a watermaster program for the entire Brazos Basin would be \$682,711 in the first year, and \$509,085 in the second year.<sup>209</sup> The primary difference between Ms. Hooper's and Mr. Blumberg's estimates is that he assumed a larger staff for the watermaster program.<sup>210</sup>

Ms. Hooper also estimated the rates that would need to be charged for water usage in the Basin to recover the costs of the watermaster program. She concluded that municipal rates would be roughly \$0.16 per acre-foot in the first year, and roughly \$0.11 per acre-foot in the

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<sup>205</sup> NRG Ex. 100 at 3-5; NRG Ex. 103.

<sup>206</sup> NRG Ex. 100 at 4-5; NRG Ex. 104.

<sup>207</sup> NRG Ex. 100 at 5-8; NRG Ex. 106.

<sup>208</sup> Tr. at 421-22.

<sup>209</sup> ED Ex. Hooper-6.

<sup>210</sup> ED Ex. Hooper-1 (Hooper Direct) at 16.



second year. She did not estimate an irrigation rate.<sup>211</sup> There are roughly 1,350 water rights in the Basin. However, because of the size of their water rights, Ms. Hooper estimated that roughly half of the entire cost of a watermaster program for the Basin would be paid for by four water right holders: BRA, Dow, GCWA, and NRG.<sup>212</sup>

The parties opposed to a watermaster did not offer evidence as to the estimated costs of administering the watermaster program, nor did they meaningfully challenge the cost estimates provided by Mr. Blumberg and Ms. Hooper. The members of the Upper Brazos Coalition expressed concerns that the costs of the watermaster program would be unduly high, but did not offer specifics. Tommy O'Brien, the Director of Water Utilities for the City of Abilene, explained that Abilene owns three water rights that, collectively, authorize the city to divert roughly 37,000 acre-feet of water per year. The priority dates for the city's water rights range from 1918 to 1937. However, the city's primary source of water is via contract with the West Central Texas Municipal Water District, which gets the water from Hubbard Creek Lake, located on a tributary to the Brazos. Mr. O'Brien expressed a concern that, among the Coalition's members, Abilene would sustain the largest financial impact from the appointment of a watermaster for the Upper Basin because Abilene would have to pay the watermaster fees for its own water right, plus the majority of the watermaster fees for the water diverted pursuant to the WCT District's water right.<sup>213</sup> Because they do not believe a watermaster is needed and it would not provide any benefits to water right holders in the Upper Basin, the members of the coalition also contend that they should not have to pay for the costs of a watermaster.<sup>214</sup>

In response to Mr. O'Brien's concern that the cost of the watermaster program would be burdensome to the City of Abilene, Dr. Brandes performed some calculations to estimate what the cost of the program would be per municipal customer served by the City. Using

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<sup>211</sup> ED Ex. Hooper-1 (Hooper Direct) at 19.

<sup>212</sup> Tr. at 785-88.

<sup>213</sup> UBC Ex. 1 (O'Brien Direct) at 3-4; UBC Ex. 2 at 1-6.

<sup>214</sup> UBC Ex. 1 (O'Brien Direct) at 8.

Ms. Hooper's cost estimates for the program, Dr. Brandes concluded that the cost per connection in Abilene would be roughly \$1.25 per year.<sup>215</sup>

**b. ALJs' Analysis**

The evidence overwhelmingly establishes that the benefits of appointing a watermaster will outweigh its costs. A watermaster will be more nimble and capable of dealing with shortage problems as they arise, and even *anticipating and preventing* shortages in the first place. A watermaster has more data and knowledge about current conditions and usage, and will have a full-time staff dedicated to and focused solely on managing water use in the Basin, as opposed to the teams episodically assembled by Regular Staff in response to crises. A watermaster can deal with issues within hours, whereas the Regular Staff may take days or weeks. Importantly, as Dr. Brandes explained, a watermaster can take a more nuanced and targeted approach to handling shortage issues than can Regular Staff; in essence using a scalpel as opposed to the chainsaw of a priority call. In this way, water use by all water right holders could be maximized to the fullest extent possible, while still ensuring the protection of senior rights.

Because he would have a full-time dedicated staff, it is reasonable to believe that the watermaster would do a better job of promptly detecting and stopping violations such as illegal diversions. He would also improve fairness and transparency throughout the Basin, thereby assisting all water right holders (both junior and senior) by giving them the knowledge they need to comply with the law.

Mr. Hibbs' analysis would ask whether a watermaster could do a better job in dealing with a priority call than Regular Staff could have done. Witness after witness stressed that the watermaster will be proactive while Regular Staff is reactive. In other words, a primary responsibility of a watermaster will be to actively manage water resources in such a way as to prevent crises situations (such as those warranting a priority call) from arising in the first place.

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<sup>215</sup> Tr. at 832-34

The ALJs find that a watermaster would likely manage water rights in the Basin better than the existing Regular Staff can.

The evidence also demonstrates that the financial costs of the watermaster program will be so small as to be almost undetectable, from the standpoint of cost per acre-foot. For example, water customers of the City of Abilene could expect to pay an additional \$1.25 per year, or approximately 10 cents per month. Moreover, to a large extent, the cost of a watermaster program would be offset by what the TCEQ internally spends per year in dealing with priority calls in the Basin. For example, in 2011, the agency spent \$513,874 in dealing with Basin priority calls (plus the other, non-specified costs of pulling personnel away from their normal duties), whereas the annual cost of a watermaster program will likely be in the range of \$500,000 to \$800,000. Admittedly, TCEQ incurs these types of expenses only in years when there is a priority call, whereas a watermaster would impose costs even in years with ample rainfall and water supplies.

Additionally, the costs of managing water rights in the Basin would be more fairly and equitably allocated to the holders of those rights if a watermaster is appointed, rather than being paid by all citizens of the State of Texas. It is also worth noting that, even though there are a total of roughly 1,350 water right holders in the Basin, roughly half of the total cost of a watermaster program for the Basin would be paid for by four water right holders—BRA, Dow, GCWA, and NRG (all of whom either actively support or do not oppose appointment of a watermaster).

It is also important to acknowledge the costs that might largely be avoided if a watermaster is appointed. As discussed in previous sections of this PFD, Dow and GCWA have spent millions of dollars in recent years purchasing contract water from BRA. They have done this in large part because of the unreliability of their senior rights in light of the sporadic enforcement of the prior appropriation doctrine. It is reasonable to conclude that, with appointment of a watermaster, these entities would find their water rights to be much more reliable, thereby enabling them to avoid or reduce the cost of purchasing contract water.

The ED summarizes the costs and benefits of a watermaster as follows:

The evidence in this case shows that there will be great benefits to the water rights holders in the basin to address threats and potential future threats; the costs are similar to the costs of the Commission's response (even with all of the added benefits); and the costs are more appropriately borne by the persons most benefitting from having a right to use state-owned water.<sup>216</sup>

The ALJs agree and, therefore, conclude that there is a need for a watermaster in the Basin.

**C. A Watermaster Should be Appointed for the Entire Basin**

**1. Evidence Presented**

Several parties who are opposed to the appointment of a watermaster argue, in the alternative, that if a watermaster is appointed, then the geographic scope of the appointment should be for less than the entire Basin. The Leonard Trusts argue, for example, that the region over which any watermaster has jurisdiction should not include property owned by the Trusts in Hood County, Texas. The Trusts own the Starr Hollow Ranch and Golf Club, which consists of roughly 3,800 acres in northwestern Hood County, Texas.<sup>217</sup> Starr Hollow Reservoir is located on the property. It is a lake roughly 90 acres in size.<sup>218</sup> The Leonard Trusts own a water right that authorizes: (1) impoundment of up to 1,454 acre-feet in Starr Hollow Reservoir; and (2) diversion of up to 144 acre-feet for irrigation and recreational purposes, with a priority date of August 31, 1967.<sup>219</sup> Starr Hollow Reservoir is located at the headwaters of Robinson Creek, a tributary of the Brazos River. Because the reservoir is roughly 13 river miles from Lake Granbury on the Brazos River, the Leonard Trusts ask that it be excluded from the jurisdiction of

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<sup>216</sup> ED Closing Br. at 13.

<sup>217</sup> Leonard Trusts Ex. LT-005 (Leonard Direct) at 2-3.

<sup>218</sup> Leonard Trusts Ex. LT-001 (Maddux Direct) at 3.

<sup>219</sup> Leonard Trusts Ex. LT-002; Tr. at 399.

any watermaster that might be appointed in this proceeding.<sup>220</sup> The Leonard Trusts stress that the creek downstream of Starr Hollow Reservoir is extremely rugged with many deep storage depressions, a bed comprised of sand and gravel, and dense vegetation growing in the stream channel.<sup>221</sup>

Mr. Hibbs, the Coalition's expert witness, argued that a watermaster is not needed in the Upper Basin because there is no threat in the Upper Basin. He also stressed the differences between the Upper Basin and the Lower Basin.<sup>222</sup> He pointed out that, between the southeast and northwest extremes of the Basin, there is a difference of roughly 35 inches in annual rainfall. He also stressed that rainfall in the Upper Basin is typically "flashy," occurring as thunderstorms pass and large quantities of rain fall in short time periods. As a result, it is common for tributaries in the Upper Basin to have no flow for significant periods of time. Mr. Hibbs also noted that the Upper Basin is much less populated than the remainder of the Basin.<sup>223</sup>

Mr. Hibbs opined that water is managed and used very differently in the Upper Basin than in the Lower Basin. In the Upper Basin, water users are much more dependent upon stored water (as opposed to run-of-the-river flows) because streamflows tend to be unpredictable and intermittent. There are also very few springflows to create sustained base flows in surface streams.<sup>224</sup> Mr. Hibbs pointed out that the reliable yields from reservoirs built in the Upper Basin are typically much smaller than comparably sized reservoirs in the Lower Basin. For example, Hubbard Creek Reservoir has an authorized storage of roughly 318,000 acre-feet but a firm yield of only 43,000 acre-feet per year; whereas in the Lower Basin, Lake Waco has an authorized storage of roughly 192,000 acre-feet but a firm yield of 80,000 acre-feet per year.<sup>225</sup>

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<sup>220</sup> Leonard Trusts Exs. LT-001 (Maddux Direct) at 5, LT-005 (M. Leonard Direct) at 5, and LT-007 (Davies Direct) at 5.

<sup>221</sup> Leonard Trusts Ex. LT-007 (Davies Direct) at 6-10.

<sup>222</sup> Tr. at 504.

<sup>223</sup> UBC Ex. 4 (Hibbs Direct) at 8-9.

<sup>224</sup> UBC Ex. 4 (Hibbs Direct) at 14.

<sup>225</sup> UBC Ex. 4 (Hibbs Direct) at 15.

Mr. Hibbs also emphasized the vastness and diversity of the Basin. It is the largest river basin in the State of Texas, stretching from New Mexico to the Texas Gulf, spanning six ecoregions, and draining roughly 42,000 square miles.<sup>226</sup> Based upon these differences, Mr. Hibbs and the Upper Brazos Coalition contend that a “one size fits all” approach should not be used to manage water throughout the Basin. Mr. Hibbs expressed concern that Coalition members would not be able to adapt if they are made subject to the same rigid constraints that a watermaster might impose elsewhere in the Basin.<sup>227</sup>

Mr. Hibbs acknowledged that there is an effort currently under way by the City of Abilene to build a new reservoir in the Upper Basin. The proposed Cedar Ridge Reservoir would be built on the Clear Fork of the Brazos River and would have a capacity of roughly 230,000 acre-feet. If and when it is built, it would be one of the biggest reservoirs in the Upper Basin.<sup>228</sup>

Mr. Hibbs testified that, if a watermaster were appointed for the Lower Basin, but not for the Upper Basin, then senior water rights in the Lower Basin would not be adversely affected, or they would be adversely affected to such a small and infrequent degree that the impact would be “miniscule.”<sup>229</sup> Thus, he concludes that water rights in the Basin as a whole could be effectively managed even if the watermaster is appointed solely for the Lower Basin, because Regular Staff would continue to oversee and manage withdrawals in the Upper Basin, and water right holders in the Upper Basin would continue to comply with the prior appropriation doctrine.<sup>230</sup> Mr. Hibbs also doubts that a watermaster would improve matters in the Upper Basin. “What will make water management easier for . . . any legal diverter in the Upper Basin is rain. The watermaster doesn’t come with rain.”<sup>231</sup>

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<sup>226</sup> UBC Ex. 4 (Hibbs Direct) at 6.

<sup>227</sup> UBC Ex. 4 (Hibbs Direct) at 16-18.

<sup>228</sup> Tr. at 536-37, 563, 566-67.

<sup>229</sup> UBC Ex. 4 (Hibbs Direct) at 36-37.

<sup>230</sup> UBC Ex. 4 (Hibbs Direct) at 38-39.

<sup>231</sup> UBC Ex. 4 (Hibbs Direct) at 39.

Mr. Hibbs believes Possum Kingdom should be included in the Lower Basin (and therefore within the watermaster's jurisdiction) because, with a capacity of 750,000 acre-feet, it is a "big bucket" that helps in the management of the remainder of the Lower Basin.<sup>232</sup> He acknowledged that the lake is hydrologically connected to, and 100% dependent upon, flows from the Upper Basin.<sup>233</sup>

BRA takes no position on the question of whether a watermaster should be appointed. In the event that one is appointed, however, BRA contends that the watermaster's jurisdiction should extend to the entirety of the Basin.<sup>234</sup> BRA has water rights for storage and use of water from eleven reservoirs in the Basin. Three are on the main stem of the river—Possum Kingdom Lake, Lake Granbury, and Whitney Lake. The other eight are located on tributaries. These eleven reservoirs are collectively known as the "System reservoirs." BRA's water rights associated with the System reservoirs authorize diversions totaling roughly 662,000 acre-feet for multiple uses, and authorize impoundment of roughly 2.2 million acre-feet.<sup>235</sup> BRA holds a permit known as the "System Operation Order," which provides flexibility in how BRA manages and uses water from the eleven System reservoirs, and allows BRA to choose from which reservoirs to supply water to wholesale customers.<sup>236</sup>

Mr. Brunett testified that there were several reasons why BRA believes any watermaster program should cover the entire Basin. First, Basin-wide jurisdiction would protect BRA's Possum Kingdom water right from upstream out-of-priority diversions. For example, Mr. Brunett testified that, in the absence of a watermaster in the Upper Basin, there are reservoirs upstream of Possum Kingdom that are junior in priority to Possum Kingdom but that could improperly impound water that should be sent downstream to satisfy BRA's senior right at Possum Kingdom. Mr. Brunett believes that, with a watermaster in place for the Upper Basin,

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<sup>232</sup> Tr. at 497-98.

<sup>233</sup> Tr. at 499.

<sup>234</sup> BRA Ex. 1 (Brunett Direct) at 12; BRA Ex. 5.

<sup>235</sup> BRA Ex. 1 (Brunett Direct) at 4-6.

<sup>236</sup> BRA Ex. 1 (Brunett Direct) at 6.

such out-of-priority impoundments could be prevented. Moreover, if the Upper Basin were excluded, then more water right holders in the Lower Basin could be required to pass water downstream to make up for water that might otherwise come from the Upper Basin if the prior appropriation doctrine was being fully enforced in the Upper Basin.<sup>237</sup>

Second, from the standpoint of administrative efficiency, BRA believes it would make no sense to have a portion of the Basin under watermaster administration and another portion under Regular Staff's enforcement. BRA believes the costs of a watermaster program will be substantially the same whether the program is Basin-wide or limited to only a portion of the Basin. Thus, there would be very limited additional cost for including the Upper Basin. There would also be the benefit of spreading those costs among a larger number of water right holders.<sup>238</sup>

Finally, BRA believes that if the Upper Basin is excluded from the watermaster's jurisdiction, it would be unfair with respect to BRA's water right in Possum Kingdom Lake, its most senior water right. Using the Aligned Parties' cost estimates for watermaster administration, BRA estimates that it would pay roughly \$79,000 per year in watermaster fees for its Possum Kingdom water rights. If the lake is included in the watermaster's jurisdiction, but the Upper Basin is not, then BRA would unfairly be paying a substantial amount of money for the watermaster program without receiving the benefits of the program for its Possum Kingdom rights.<sup>239</sup>

The Aligned Parties oppose any effort to appoint a watermaster for less than the entire Basin. In response to Mr. Hibbs' argument that the Upper Basin ought not be under the jurisdiction of a watermaster because it is much drier than the remainder of the Basin, Dr. Brandes provided a map showing the locations of the other watermaster programs in effect in the state. That map indicates that the great majority of area covered by existing watermaster

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<sup>237</sup> BRA Ex. 1 (Brunett Direct) at 18-19.

<sup>238</sup> BRA Ex. 1 (Brunett Direct) at 20.

<sup>239</sup> BRA Ex. 1 (Brunett Direct) at 20-21.



programs are in locations with precipitation totals similar (or even lower) than those found in the Upper Basin. For example, the Rio Grande Watermaster covers an area with rainfall totals ranging from 10 to 20 inches per year.<sup>240</sup>

Dr. Brandes' opinion is that the entire Basin should be governed by a watermaster. He contended that it would be difficult for a watermaster to apportion available stream flows among the water rights within his jurisdiction while lacking significant knowledge about the rights outside and upstream of his jurisdiction. In this situation, a watermaster would be forced to do his job with less than all the data he needs. For example, he would have DOIs only from the diverters within his jurisdiction, thereby leaving him in the dark as to the water use plans of the water right holders upstream of his jurisdiction. The lack of information regarding diversion and impoundments in the excluded area would make enforcement of prior appropriation in the included area even more difficult.<sup>241</sup>

Using the WAM for the Brazos River, Dr. Brandes performed an analysis to model the impact of excluding various areas from the watermaster's jurisdiction. As explained above in this PFD (in the discussion of threat), Drs. Brandes and Furnans believe that, outside watermaster areas, each water right holder diverts as much as it is able without regard to the prior appropriation doctrine. Thus, similar to the "natural priority" model runs he did to evaluate threat, Dr. Brandes performed model runs that assumed all water rights in the various areas excluded from a watermaster's jurisdiction were senior to the rights within the watermaster's jurisdiction.<sup>242</sup> He then compared these analyses to a model run in which all of the Basin is governed by a watermaster and fully compliant with the prior appropriation doctrine.

According to Dr. Brandes, the results from these analyses show that the reliability for some water rights located downstream from areas excluded from a watermaster's jurisdiction will be reduced as a result of the exclusion, while the reliability of some water rights located in

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<sup>240</sup> AP Ex. 5.

<sup>241</sup> Dow Ex. 200 (Brandes Direct) at 43-44.

<sup>242</sup> Dow Ex. 200 (Brandes Direct) at 45-46; Dow Ex. 211.

the excluded areas will increase as a result of the exclusion. In other words, water right holders in the watermaster area would have access to less water than they would otherwise be entitled, and water right holders outside the area would have access to more water than they would otherwise be entitled.<sup>243</sup> For Dr. Brandes, this “clearly demonstrates” that the entire Basin should be included within the watermaster’s jurisdiction. He believes any other arrangement would have a “significant negative impact on the ability of the watermaster to effectively administer water rights.”<sup>244</sup>

Dr. Brandes also analyzed the relative priorities of water rights in the Basin to determine how effective a watermaster with jurisdiction over only a part of the Basin could be. For example, if a priority call order was issued with a priority date of 1929, junior water right holders above Possum Kingdom Lake would represent roughly two-thirds of the total volume of water being sought by the senior right holders intended to be protected by the call. This suggests to Dr. Brandes that if the jurisdiction of the watermaster did not include the Upper Basin, the watermaster’s effectiveness at protecting senior rights would be significantly limited.<sup>245</sup>

Based upon his model runs that are described above, Dr. Brandes prepared illustrations showing that excluding the Upper Basin from the watermaster’s jurisdiction would likely: (1) adversely affect water right holders in the Lower Basin, and (2) positively impact water right holders in the Upper Basin. This analysis demonstrates that, in years with diminished river flows, the amount of water that could reliably be diverted under selected Lower Basin water rights would be substantially lower. For example, for Certificate of Adjudication 12-4024, which is owned by the City of Gordon, the annual diversion amount during conditions like those encountered in 1956 would be reduced from roughly 70% of the permitted amount to 0%. Meanwhile, the amount of water that could reliably be diverted under selected Upper Basin water rights would be substantially higher. For example, for Permit No. 4146, which is owned by the City of Lubbock, the annual diversion amount during conditions like those encountered in

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<sup>243</sup> Dow Ex. 200 (Brandes Direct) at 47-51; Dow Ex. 212.

<sup>244</sup> Dow Ex. 200 (Brandes Direct) at 51.

<sup>245</sup> Dow Ex. 200 (Brandes Direct) at 52; Dow Ex. 213.

1953 would be increased from zero acre-feet to roughly 16,000 acre-feet.<sup>246</sup> For these reasons, Dr. Brandes believes that the jurisdiction of the watermaster should be Basin-wide.

Janes Gravel, which is located in the Upper Basin, agreed that the jurisdiction of the watermaster should include the Upper Basin.<sup>247</sup>

GCWA's expert, Dr. Furnans, disputed the Leonard Trusts' contention that their lake should be excluded from the watermaster's jurisdiction. He pointed out that the Trusts' rights were among those suspended in recent priority call orders, thus indicating that the ED believes that the Trusts' water right can impact other rights in the Basin. The Trusts' argument is that its right should not be within the jurisdiction of the watermaster because of the distance between its location and the main stem of the river. Ironically, Dr. Furnans pointed out that if this argument is assumed to be true, then the Trusts would be better off within the watermaster's jurisdiction than outside of it. This is because a watermaster would have the data to enable him to determine that limiting diversions or impoundment by the Leonard Trusts would be futile, whereas Regular Staff would be much less likely to make such a futility finding in the context of issuing a priority call order.<sup>248</sup>

Dr. Furnans agreed with Dr. Brandes that the entire Basin should be placed under the jurisdiction of a watermaster. Dr. Brandes analyzed the impact of excluding the Little River watershed from the watermaster's jurisdiction, which would effectively exclude most or all of the members of the Bell County Group from the watermaster's jurisdiction. Using analyses similar to those performed by Dr. Brandes, Dr. Furnans concluded that excluding the Little River Basin would result in water right holders in the Little River Basin having access to more water, and holders elsewhere in the Basin having access to less.<sup>249</sup> Based upon this analysis,

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<sup>246</sup> Dow Ex. 200 (Brandes Direct) at 554-55; Dow Exs. 214, 215.

<sup>247</sup> Tr. at 128.

<sup>248</sup> GCWA Ex. 200 (Furnans Direct) at 17; Tr. at 247-48.

<sup>249</sup> GCWA Ex. 200 (Furnans Direct) at 39-40; GCWA Ex. 210; Tr. at 265-68.

Dr. Furnans concluded that there is “no rational basis grounded in hydrology or basic principles of water management” for excluding the Little River tributary system.<sup>250</sup>

Although never definitively answering the question one way or the other, the ED questions whether the Upper Basin should be included in the watermaster area if it is created. Dr. Alexander doubted the value of the modeling done by Dr. Brandes and his conclusion that excluding the Upper Basin would leave senior rights vulnerable in the Lower Basin. She was concerned that Dr. Brandes’ analysis failed to take into account the intricacies of some of the special terms of the permits involved.<sup>251</sup> The ED argues that, if the Upper Basin were excluded, then Regular Staff could coordinate with the watermaster to the extent necessary to manage the two separate components of the Basin. By contrast, the ED argues that there is no legitimate basis for excluding the Leonard Trusts from watermaster jurisdiction.<sup>252</sup>

BFFR advocates taking a “conservative” approach by limiting the jurisdiction of a watermaster to a relatively small, but unspecified, area containing “similar water users in proximity to each other,” in order to test whether a watermaster program is effective.<sup>253</sup>

## **2. ALJs’ Analysis**

In the ALJ’s opinion, the evidence demonstrates that the entire Basin should be placed within the jurisdiction of a watermaster. The ALJs have already concluded that senior water rights are threatened throughout the Basin and a watermaster is needed. That alone is sufficient justification for Basin-wide jurisdiction.

The Leonard Trusts failed to provide convincing evidence that their property should be excluded. The Trusts’ central premise is that their reservoir is 13 miles from the main stem of

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<sup>250</sup> GCWA Ex. 200 (Furnans Direct) at 40.

<sup>251</sup> ED Ex. Alexander-1 (Alexander Direct) at 19.

<sup>252</sup> ED Closing Br. at 17.

<sup>253</sup> BFFR Closing Br. at 15.

the river, which they apparently consider such a considerable distance that no water allowed to flow from their reservoir would ever make it to the main stem. However, they produced no competent evidence to support their premise.

The ALJs were similarly unconvinced by the arguments made by the Upper Brazos Coalition. The fact that the Upper Basin is generally drier than the Lower Basin is not, in itself, a persuasive argument against a watermaster. As demonstrated by the map provided by Dr. Brandes, the current watermasters in Texas operate primarily in the drier areas of the state. Moreover, as discussed previously, the more vulnerable and precarious water rights are, the more a watermaster is needed for their protection and regulation.

Mr. Hibbs argued that the Upper Basin should not bound with the Lower Basin into a “one size fits all” approach. However, there is only one legal regime in the state with regard to surface water management. All of the water rights issued in the Upper Basin are subject to the same prior appropriation doctrine that governs the water rights in the Lower Basin.

BRA made a compelling argument that it would be inequitable for watermaster regulation to start at Possum Kingdom Lake. All parties agree that the lake is completely dependent upon flows from the Upper Basin. BRA’s very substantial and senior water right associated with the lake is vulnerable to upstream, out-of-priority diversions. Thus, it would be inequitable to make BRA pay the costs of the watermaster program without getting the benefits and protection of the watermaster for its rights associated with the lake. To some extent, the fact that the City of Abilene is working to build the Cedar Ridge Reservoir, another fairly large new reservoir upstream of Possum Kingdom Lake, suggests that the threats to BRA’s rights in the lake will continue to grow. The ALJs also agree with BRA’s argument that, from the standpoint of efficiency and economies of scale, it makes good sense to place the entire Basin under the watermaster’s jurisdiction.

The Aligned Parties made compelling arguments that reducing the watermaster’s jurisdiction would also reduce the watermaster’s effectiveness. Throughout the hearing, witness

after witness stressed that one of the primary benefits of a watermaster is that he has access to real-time data about what is happening on the river. However, a watermaster with jurisdiction over only half a river, will likely have real-time information about only his half of the river. Like Regular Staff, the watermaster would be largely in the dark about what is happening in the remainder of the river. This lack of data would make proper enforcement of the prior appropriation doctrine much more difficult and imprecise.

The modeling done by Drs. Brandes and Furnans was convincing and demonstrated the likelihood that limiting the watermaster's jurisdiction would create distortions to the priority system. That is, those outside the watermaster's jurisdiction would likely end up with access to more water than they are entitled to and those inside would end up with less. For all of these reasons, the ALJs conclude that the jurisdiction of the watermaster should extend to the entirety of the Brazos River Basin.

## VII. TRANSCRIPT

A court reporter is generally required for any proceeding set to last longer than one day.<sup>254</sup> Upon their own motion, ALJs may request an original and two copies of a transcript of a proceeding and may require the applicant to pay for the transcript in advance subject to reimbursement from other parties upon assessment of costs.<sup>255</sup>

Because the hearing was scheduled for more than one day, the ALJs ordered the Petitioners to arrange for and pay a court reporter to record and transcribe the hearing on the merits and to deliver the original transcript to the ALJs and two copies to the TCEQ's Chief Clerk on an expedited basis. The total cost of the transcript was \$10,196.<sup>256</sup>

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<sup>254</sup> 1 Tex. Admin. Code. § 155.423(b).

<sup>255</sup> 30 Tex. Admin. Code. § 80.23(b)(4) and (5).

<sup>256</sup> Aligned Parties' Response to Closing Arguments, attach. 2, which is admitted into evidence as AP Ex. 10. Any objection to the admission of the exhibit should be filed as an exception to this PFD.

The Commission's rules provide that the Commission will not assess transcript costs against the ED or the OPIC<sup>257</sup> and that it will consider the following relevant factors in allocating reporting and transcription costs among the other parties:<sup>258</sup>

- the party who requested the transcript;
- the financial ability of the party to pay the costs;
- the extent to which the party participated in the hearing;
- the relative benefits to the various parties of having a transcript;
- the budgetary constraints of a state or federal administrative agency participating in the proceeding;
- in rate proceedings, the extent to which the expense of the rate proceeding is included in the utility's allowable expenses; and
- any other factor which is relevant to a just and reasonable assessment of costs.

The Aligned Parties propose to allocate the cost as follows: \$7,196 to the Aligned Parties, \$1,000 to the Bell County Group, \$1,000 to the Upper Brazos Coalition, and \$1,000 to the Brazos River Authority. No other party proposed a different allocation of the transcript expense, or objected to the Aligned Parties' proposal. The Aligned Parties argue that the Bell County Group, the Upper Brazos Coalition, and BRA benefitted from the transcript and have the ability to pay a share of the cost. The Aligned Parties do not oppose bearing a greater share of the cost.

The ALJs conclude that the allocation proposed by the Aligned Parties is reasonable and should be approved by the Commission. They agree that all parties who fully participated in the hearing and filed post-hearing arguments benefitted from the transcript. That includes all the parties to whom the Aligned Parties propose a share of the transcript cost be allocated. The ALJs also agree that the Bell County Group and the Upper Brazos Coalition, which collectively include cities and water districts, and BRA, one of the state's large river authorities, have ample resources to pay \$1,000 each for the transcript.

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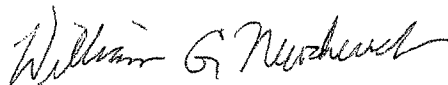
<sup>257</sup> 30 Tex. Admin. Code § 80.23(d)(2).

<sup>258</sup> 30 Tex. Admin. Code § 80.23(d)(1).

### VIII. RECOMMENDATION

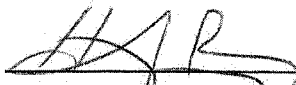
The ALJs recommend that the Commission adopt the attached proposed order, directing the ED to appoint a watermaster with jurisdiction over all of the Brazos River Basin and allocating the costs of the transcript as discussed above.

**SIGNED December 17, 2013.**



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**WILLIAM G. NEWCHURCH  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS**



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**HUNTER BURKHALTER  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS**



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER GRANTING THE PETITION FOR THE APPOINTMENT OF A  
WATERMASTER IN THE BRAZOS RIVER BASIN FILED BY  
THE BRAZOS RIVER COALITION;  
TCEQ DOCKET NO. 2013-0174-WR;  
SOAH DOCKET NO. 582-13-3040**

On \_\_\_\_\_, the Texas Commission on Environmental Quality (Commission or TCEQ) considered a petition (Petition) by holders of water rights in the Brazos River Basin (Basin) asking the Commission to authorize its Executive Director (ED) to appoint a watermaster to monitor, regulate, and control water withdrawals from the Basin. A proposal for decision (PFD) was presented by William G. Newchurch and Hunter Burkhalter, Administrative Law Judges (ALJs) with the State Office of Administrative Hearings (SOAH), who conducted a hearing concerning the Petition on September 23 through 26, 2013, in Austin, Texas.

After considering the ALJs' PFD, the Commission adopts the following Findings of Fact and Conclusions of Law:

**I. FINDINGS OF FACT**

1. On January 7, 2013, 35 holders of water rights in the Basin (Petitioners) filed the Petition asking Commission to authorize its ED to appoint a watermaster to monitor, regulate, and control water withdrawals from the Basin.
2. The Petitioners claimed that a watermaster was needed because senior water rights in the Basin were threatened.
3. On January 29, 2013, the Commission's Chief Clerk sent notice to the Petitioners that the Commission would consider the Petition and determine whether to refer it to SOAH for hearing at its February 13, 2013 meeting.

4. On February 13, 2013, the Commission found that the Petition was signed by more than 25 water right holders in the Basin and referred it to SOAH for hearing.
5. On March 13, 2013, the Commission's Chief Clerk mailed a notice of hearing to the Petitioners, all other holders of water rights in the Basin, the ED, and the Office of Public Interest Counsel (OPIC). It contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
6. As indicated in the notice of hearing, ALJ Newchurch conducted a preliminary hearing on April 17, 2013, at which jurisdiction was proven and parties were admitted.
7. Some parties later withdrew. The following are currently parties in this case and are generally grouped by their position on the granting of the Petition:

<b>PARTIES</b>	<b>REPRESENTATIVES</b>
<b>Petitioners</b>	
Gulf Coast Water Authority (GCWA)	Molly Cagle and Paulina Williams
The Dow Chemical Co. (Dow)	Fred B. Werkenthin, Jr.
NRG Texas Power LLC (NRG)	Joe Freeland
R. E. Janes Gravel Co. (Janes Gravel)	Scott R. Shoemaker
Brazosport Water Authority (BWA)	Ronald Woodruff
I. J. Talbott	self
City of Cleburne	not specified
Chester E. Dixon	self
Arledge & Shannon, LP	not specified
<b>Protestants</b>	
City of Lubbock, City of Abilene, City of Stamford, West Central Texas Municipal Water District, North Central Texas Municipal Water Authority, and White River Municipal Water District (Upper Brazos Coalition)	Jason Hill
Bell County WCID No. 1, City of Harker Heights, City of Belton, City of Killeen, and City of Copperas Cove (Bell County Group)	David Tuckfield
Bradley B. Ware, and William and Gladys Gavranovic, Jr. (BFFR)	Gwendolyn Hill Webb and Stephen P. Webb
Kacir-Wheeler LLC	Brent Wheeler

<b>PARTIES</b>	<b>REPRESENTATIVES</b>
JPMORGAN Chase Bank, N.A., as Trustee of the Mary Leonard Children's Trust, Miranda Leonard Trust III, Martha Leonard Trust III, and Madelon Leonard Trust III (Leonard Trusts)	W. Thomas Buckle
Dan Kacir	self
George Sidney Kacir	self
<b>Neutrals</b>	
Brazos River Authority (BRA)	Doug Caroom
City of Houston	Edmond R. McCarthy Jr. and Edmond R. McCarthy III
Luminant Generation Company	Elizabeth Townsend
<b>Statutory Parties</b>	
OPIC	James B. Murphy and Eli Martinez
ED	Ross Henderson

8. GCWA, Dow, NRG, and Janes Gravel were aligned and are referred to as “the Aligned Parties.
9. Many of the Petitioners later withdrew their requests for appointment of a watermaster. The table below shows all of the original Petitioners and indicates the ones who continue to actively seek the appointment of a watermaster and those who have withdrawn as Petitioners:

<b>Petitioner</b>	<b>Status</b>	<b>Certificate of Adjudication Nos.</b>
Dow	active	12-5328, 12-5322 & 12-5171
NRG	active	12-5320 & 12-5325
BWA	active	12-5366
I. J. Talbott, Trustee	active	12-5329
GCWA	active	12-5168
Thomas Hicks	active	12-4133
Janes Gravel	active	12-3710
Richard D. Lundberg and Lundberg Farms	active	6-2294
Hugh W. Davis	active	2304
Jane H. Cravens	active	3460
Arledge & Shannon, LP	active	3773
Margie Kraemer, Kraemer Farms	active	4015
John Nigliazzo <i>et ux</i>	active	4145
Chester E. Dixon	active	2948 & 2949

<b>Petitioner</b>	<b>Status</b>	<b>Certificate of Adjudication Nos.</b>
City of Cleburne	active	4106A-C & 4258
Weldon S. Laas	withdrawn	12-5819
Richard T. Lietz Estate	withdrawn	12-4090
Charlie Ray Cockburn	withdrawn	12-4032
Don Weinacht	withdrawn	12-4023
Keith David Lemons	withdrawn	12-3677
Joe D. and John R. Moore	withdrawn	12-3651
Nellie Earline Brooks Tomme	withdrawn	12-2964
W. T. Crumley	withdrawn	12-2229
Jim Hering	withdrawn	2310
P. D. Gunter	withdrawn	2818
J. B. Gunter	withdrawn	2819
L. T. Warlick	withdrawn	2875
Barry Siebenlist	withdrawn	2946
Louis Pitcock Jr.	withdrawn	3457
Margaret Janes	withdrawn	3569
JFB Farms	withdrawn	3619
Frances Davis	withdrawn	3724
Harvest Quail, Inc.	withdrawn	4011
KHK Foggy Bottom Farms, Inc.	withdrawn	4016
Ted Higginbottom, Al David Kirk and Bill Kirk	withdrawn	4016
KL Nixon Estate	withdrawn	5278

10. None of the 35 valid original Petitioners withdrew before June 3, 2013.
11. There were more than 25 Petitioners when the Commission first acted on the Petition on February 13, 2013.
12. On September 23, 2013, ALJs Newchurch and Burkhalter convened the hearing on the merits after providing notice to the parties through an order issued on April 18, 2013. The hearing on the merits concluded on September 26, 2013.
13. Because the hearing on the merits was scheduled for more than one day, the ALJs ordered the Petitioners to arrange for and pay a court reporter to record and transcribe the hearing and to deliver the original transcript to the ALJs and two copies to the TCEQ's Chief Clerk on an expedited basis. The total cost of the transcript was \$10,196.
14. The Aligned Parties, the Bell County Group, the Upper Brazos Coalition, and BRA benefitted from the transcript and have the ability to pay a share of the cost.
15. The Aligned Parties have agreed to pay \$7,196 of the transcript cost.

16. The following are the principal procedural events in this case:

DATE	EVENT
January 7, 2013	Petition filed with the Commission.
February 19, 2013	Commission referred the Petition to SOAH for hearing.
March 13, 2013	Notice of hearing mailed to all water right holders in the Basin.
April 17, 2013	Preliminary hearing and discovery began.
September 23, 2013	Hearing on the merits began.
September 26, 2013	Hearing on the merits ended.
October 16, 2013	Deadline to file closing briefs and arguments.
October 25, 2013	Deadline to file responses to closing briefs and arguments.
December 17, 2013	Deadline to issue PFD.

17. Pursuant to the prior appropriation doctrine, each water right holder may make his authorized diversions of water only if sufficient water would still be available to satisfy all senior downstream water rights.
18. Outside a watermaster area, it is difficult to administer and enforce the prior appropriation doctrine because there is little data available to enable each water right holder to know whether it can divert water without impairing senior rights.
19. Due to this paucity of data, in the absence of a watermaster or a TCEQ order enforcing a priority call, water right holders often exercise their water rights to the fullest extent possible, without regard to the needs of senior water rights or the requirements of the prior appropriation doctrine.
20. Outside of watermaster areas, the TCEQ does not actively enforce the prior appropriation doctrine on a day-to-day basis. Instead, the ED typically enforces only in a reactive mode, in response to a complaint or “priority call” by a water right holder who alleges it is the victim of out-of-priority diversions by junior water right holders.
21. In times of low flow, the water available in the Basin is not sufficient to satisfy all of the authorized water rights.
22. Dow holds Certificate of Adjudication No. 12-5328, which authorizes it to divert roughly 240,000 acre-feet of water per year from the Brazos River for use at the Freeport facility, with priority dates ranging from 1929 to 1976.
23. Dow’s water right is the last major right on the Brazos River before it flows into the Gulf of Mexico. Because of its location, it is uniquely vulnerable, especially during low flow periods, to over-appropriations by junior diverters in the Basin.
24. In recent years, there have been repeated instances when there has been insufficient water in the river to fully satisfy Dow’s water rights. In response, the company made priority calls to the TCEQ in 2009, 2011, 2012, and 2013.

25. Dow's 2009 priority call was made on June 19, 2009, at a time when the river was flowing at a rate low enough to hinder Dow's ability to continue to pump from the river. More than 40 days after the priority call was made, the TCEQ suspended water rights junior to 1980 below certain BRA reservoirs.
26. Dow's next priority call was made on April 18, 2011, at a time when the river was flowing at a rate insufficient to enable Dow to divert enough water from the River as allowed by its water rights.
27. The ED took 41 days to respond to Dow's 2011 priority call, ultimately suspending all rights junior to August 8, 1960 (excluding municipal and power generation uses), and enlarging the area subject to the priority call to include all water rights in the Basin below Possum Kingdom Lake.
28. Dow made a third priority call on November 14, 2012. In response, the ED suspended all water rights in the Basin below Possum Kingdom Reservoir (other than municipal and power generation rights) junior to 1942.
29. Dow made a fourth priority call on June 26, 2013. In response, the TCEQ suspended all water rights in the Basin below Possum Kingdom Lake (including municipal and power generation rights) junior to February 19, 1942.
30. None of the priority calls resulted in a significant increase in the amount of water available at Dow's facility.
31. Due to concerns about the reliability of its senior water rights, Dow purchased interruptible water from BRA pursuant to contract on multiple occasions since January 1, 2009. Dow has paid BRA more than \$9 million for this interruptible water.
32. GCWA is a conservation and reclamation district that distributes water in Galveston, Brazoria, and Fort Bend Counties.
33. GCWA has water rights in the Basin totaling roughly 380,000 acre-feet with priority dates ranging from 1926 to 1983 that authorize GCWA to divert water at the lower end of the Basin near the Gulf of Mexico.
34. In recent years, GCWA has purchased water pursuant to contracts with BRA at a cost of roughly \$3.9 million per year because it was concerned about the reliability of its senior water rights.
35. In the years 2009, 2011, and 2013, river flows were inadequate to enable GCWA to fully exercise its water rights, thereby forcing GCWA to also rely on its contracted water from BRA.

36. In 2009, GCWA purchased an additional 24,000 acre-feet of interruptible water from BRA, at a cost of \$942,000.
37. In 2011, GCWA purchased an additional 91,486 acre-feet of interruptible water from BRA, at a cost of \$4.8 million.
38. In mid-June 2013, flows in the Brazos River fell below 100 cubic feet per second (cfs) in the areas around GCWA's intake pumps, making it difficult for GCWA to make its authorized diversions. In response, GCWA submitted a priority call to the TCEQ on June 20, 2013.
39. In recent years, a number of junior water right holders in the Basin have made out-of-priority diversions or impoundments in violation of the prior appropriation doctrine.
40. A number of junior water right holders in the Basin made diversions in violation of the TCEQ's 2013 priority call order.
41. In this Order, the area of the Brazos River Basin above Possum Kingdom Lake is described as the Upper Basin, while the remainder (including Possum Kingdom Lake) is described as the Lower Basin.
42. Periods of low flow are persistent and recurrent in the Upper Basin.
43. A significant number of water rights in the Upper Basin are unreliable and rarely fully satisfied.
44. In recent years, at least two priority calls have been made by water right holders in the Upper Basin.
45. Senior water rights are threatened throughout the Basin, including the Upper Basin.
46. In times of water shortage, senior water right holders in the Basin are threatened by the situation of less available water than appropriated water rights.
47. In times of water shortage, senior water right holders in the Basin are threatened by the disregard of prior appropriation by junior water right holders.
48. In times of water shortage, senior water right holders in the Basin are threatened by the storage of water by holders of junior rights.
49. In times of water shortage, senior water right holders in the Basin are threatened by the diversion, taking, or use of water in excess of the quantities to which other holders of water rights are lawfully entitled.
50. Under the current regime for managing water rights in the Basin without a watermaster, senior water right holders in low flow years cannot fully and reliably divert or impound

the amounts of water to which they are legally entitled under their water rights, even though junior water right holders are able to divert or impound water.

51. Watermasters have a full-time staff dedicated to the single task of managing water rights.
52. Watermasters have access to real-time data regarding stream flows and water usages, including information regarding what water is being diverted pursuant to what water rights.
53. A watermaster's access to real-time data enables a watermaster to quickly identify and stop illegal diversions.
54. Inside watermaster areas, each water right holder is required to:
  - a. Install meters on their water pumps; and
  - b. Submit to the watermaster a declaration of intent to divert (DOI) that states how much water the holder intends to divert and when it intends to divert it.
55. Watermasters can respond quickly and capably to water shortages and illegal diversions.
56. A watermaster's staff can perform frequent field investigations.
57. A watermaster can lock pumps for violations and allocate flows among priority users during water shortages.
58. A watermaster can continuously monitor stream flows, reservoir levels, and water use in a river basin.
59. A watermaster can coordinate diversions to ensure that all users get the best overall value from the available water, while still protecting senior rights.
60. A watermaster can anticipate a shortage before it reaches a crisis, and develop a strategy for proactively dealing with the anticipated shortage.
61. A watermaster can serve as an intermediary between water rights holders, thereby avoiding costly litigation.
62. A watermaster can provide valuable technical assistance to water users.
63. Watermasters can play a more active and day-to-day role in the management of water rights than can the TCEQ regular staff (Regular Staff).
64. Watermaster can efficiently address the timing of diversions, thereby reducing the possibility of waste.



65. Watermasters are better able to prevent interference with released water purchased from storage.
66. Watermasters are more aware of drought conditions as they develop.
67. Watermasters are proactive, not reactive.
68. Watermasters can take actions within hours of when an issue arises.
69. Watermasters can deal with shortages in a more nuanced and individualized basis than Regular Staff is able to do with a priority call order, thereby maximizing the use of water and avoiding waste while better enforcing the prior appropriation doctrine.
70. Watermasters can increase fairness and transparency with respect to water rights.
71. The total ongoing costs of a Brazos River watermaster would likely be between roughly \$500,000 and \$800,000 per year.
72. Approximately one-half of the cost of a watermaster for the Basin would be paid for by four water right holders who either support or take no position on the appointment of a watermaster for the entire Basin: BRA, NRG, GCWA, and Dow.
73. The ED's response to the 2009 priority call cost the Commission approximately \$283,328.
74. The ED's response to the 2011 priority call cost the Commission approximately \$513,874.
75. Significant TCEQ staff time and resources are diverted away from other program duties during the implementation of priority calls.
76. Outside watermaster areas, the costs of managing water rights are paid by the TCEQ using general revenues.
77. Inside a watermaster area, the financial costs incurred by a watermaster are paid by the holders of the water rights that are administered by the watermaster.
78. Since 2009, Dow has paid more than \$9 million, and GCWA has paid over \$5 million, to obtain additional interruptible water via contracts to offset low stream flow in the river at their diversion points, which was attributable in part to out-of-turn diversions and impoundment of inflows.
79. The financial cost of a watermaster program for the Basin would be very low to holders of water rights in the Basin per acre-foot of water right that they hold.

80. The cost of a watermaster program would be largely offset by enabling the TCEQ to avoid what it internally spends per year in dealing with priority calls in the Basin.
81. If a watermaster is appointed for the Basin, the costs of managing water rights in the Basin would be more fairly and equitably allocated among the holders of those rights, rather than being paid by all citizens of Texas.
82. With appointment of a watermaster, entities such as Dow and GCWA would likely find their water rights to be much more reliable, thereby enabling them to avoid or reduce the cost of purchasing contract water.
83. A watermaster is needed in the Basin because the appointment of a watermaster would be desirable and useful for the proper management of water rights in the Basin.
84. The Upper Basin is an integral part of the overall Brazos River system and should not be excluded from the watermaster's geographical and jurisdictional boundaries.
85. Possum Kingdom Lake is completely dependent upon water flows from the Upper Basin.
86. If the Upper Basin were excluded from the jurisdiction of a watermaster, BRA's large and relatively senior water rights associated with Possum Kingdom Lake would be less protected from the risk of out-of-priority diversions by upstream water right holders.
87. If the Upper Basin were excluded from the jurisdiction of a watermaster, BRA would pay watermaster fees associated with its Possum Kingdom Lake rights without getting the benefits and protections of the watermaster program for those rights.
88. The Basin includes numerous tributaries that are an integral part of the Brazos River system and should not be excluded from the watermaster's geographical and jurisdictional boundaries.
89. If a watermaster was appointed with jurisdiction over only a portion of the Basin, the watermaster's effectiveness would be impaired and the Commission's enforcement of the prior appropriation doctrine in the Basin would be more difficult, imprecise, inefficient, and expensive.

## **II. CONCLUSIONS OF LAW**

1. On petition of 25 or more holders of water rights in a river basin or segment of a river basin or on its own motion the Commission may authorize the ED to appoint a watermaster for a river basin or segment of a river basin if the Commission finds that the rights of senior water rights holders in the basin or segment of the basin are threatened. Tex. Water Code § 11.451.

2. The Commission has jurisdiction to consider and act on the Petition because it was originally filed by more than 25 holders of water rights in the Basin. Tex. Water Code § 11.451.
3. The Commission did not subsequently lose jurisdiction after some Petitioners withdrew, leaving less than 25 remaining.
4. Notice of the hearing on the Petition was given as required by Texas Government Code §§ 2001.051 and 2001.052.
5. SOAH has jurisdiction over matters related to the hearing in this matter, including the authority to issue a PFD with Findings of Fact and Conclusions of Law. Tex. Gov't Code ch. 2003.
6. The Petitioners have the burden of proof by a preponderance of the evidence. 30 Tex. Admin. Code § 80.17.
7. Water rights in Texas are subject to the prior appropriation doctrine, meaning that a water right with a given priority date is “junior” to all water rights with older priority dates and “senior” to all water rights with a later priority date. Tex. Water Code § 11.027.
8. The Commission may authorize the appointment of a watermaster if it finds that the rights of senior water right holders in a basin are threatened and a need exists for appointment of a watermaster for the basin or a segment of the basin. Tex. Water Code §§ 11.451 and 11.452.
9. Senior water rights are threatened throughout the Basin.
10. A need exists for the appointment of a watermaster throughout the Basin.
11. A watermaster should be appointed with jurisdiction over the entire Basin.
12. For any proceeding set to last longer than one day, a court reporter is generally required. 1 Tex. Admin. Code. § 155.423(b).
13. Upon their own motion, ALJs may request an original and two copies of a transcript of a proceeding and may require the applicant to pay for the transcript in advance subject to reimbursement from other parties upon assessment of costs. 30 Tex. Admin. Code. § 80.23(b)(4) and (5).
14. The Commission will not assess transcript costs against the ED or the OPIC. 30 TAC § 80.23(d)(2).
15. Under 30 Tex. Admin. Code § 80.23(d)(1), the Commission will consider the following relevant factors in allocating reporting and transcription costs among the parties:

- the party who requested the transcript;
  - the financial ability of the party to pay the costs;
  - the extent to which the party participated in the hearing;
  - the relative benefits to the various parties of having a transcript;
  - the budgetary constraints of a state or federal administrative agency participating in the proceeding;
  - in rate proceedings, the extent to which the expense of the rate proceeding is included in the utility's allowable expenses; and
  - any other factor which is relevant to a just and reasonable assessment of costs.
16. The transcript cost should be allocated as follows: \$7,196 to the Aligned Parties, \$1,000 to the Bell County Group, \$1,000 to the Upper Brazos Coalition, and \$1,000 to the Brazos River Authority.

**NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY THAT:**

1. The Petition for the appointment of a watermaster in the Brazos River Basin is granted.
2. The ED shall appoint a watermaster with jurisdiction over the entire Brazos River Basin.
3. The Aligned Parties shall pay \$7,196 for the cost of the transcript, and the Bell County Group, the Upper Brazos Coalition, and the Brazos River Authority shall each pay \$1,000 for the cost of the transcript.
4. The effective date of this Order is the date the Order is final.
5. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief not expressly granted herein, are hereby denied for want of merit.
6. If any provision, sentence, clause, or phase of this Order is for any reason held to be invalid, the invalidity of any portion shall not affect the validity of the remaining portions of the Order.

7. The Chief Clerk of the Texas Commission on Environmental Quality shall forward a copy of this Order to the parties.

Issue Date:

**TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

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**Bryan W. Shaw, Ph.D., Chairman**  
**For the Commission**